EDITOR'S NOTE

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No. 86-761-CFX
Status: GRANTED

Title: Cynthia A. Forrester, Petitioner
v.
Howard Lee White

Docketed:
November 12, 1986

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Sedey,Mary Anne

Counsel for respondent: Kaplan,Rosalyn B., Rosen,Patricia

Entry	Date	Note	Proceedings and Orders
1	Nov 12 1986	G	Petition for writ of certiorari filed.
2	Dec 17 1986		DISTRIBUTED. January 9, 1987
3	Jan 6 1987	F	Response requested.
4	Feb 4 1987		Brief of respondent Howard Lee White in opposition filed.
5	Feb 4 1987		REDISTRIBUTED. February 20, 1987
6	Feb 23 1987		Petition GRANTED.
			**********
7	Mar 26 1987		Record filed.
8	Mar 26 1987		Certified copy of C. A. proceedings received.
10	Apr 2 1987		Order extending time to file brief of petitioner on the merits until April 30, 1987.
11	Apr 30 1987		Brief of petitioner Cynthia A. Forrester filed.
12	May 1 1987	G	Motion of petitioner to dispense with printing the joint appendix filed.
13	May 18 1987		Motion of petitioner to dispense with printing the joint appendix GRANTED.
14	May 28 1987		Record filed.
16	Jun 1 1987		Order extending time to file brief of respondent on the merits until July 24, 1987.
17	Jul 24 1987		Brief of respondent Judge Howard Lee White filed.
18	Jul 24 1987	G	Motion of IL Judges Association for leave to file a brief as amicus curiae filed.
19	Aug 6 1987		CIRCULATED.
20	Aug 26 1987		Motion of IL Judges Association for leave to file a brief as amicus curiae GRANTED.
21	Aug 31 1987		SET FOR ARGUMENT. Monday, November 2, 1987. (2nd case).
22	Oct 23 1987	X	Reply brief of petitioner Cynthia A. Forrester filed.
23	Nov 2 1987		ARGUED.

86-761

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYNTHIA A. FORRESTER,
Petitioner,

vs

JUDGE HOWARD LEE WHITE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARY ANNE SEDEY
(Counsel of Record)
2608 South Kingshighway
St. Louis, Missouri 63139
(314) 773-3566
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Does the doctrine of judicial immunity bar a civil action for damages against a judge for demoting and discharging a court employee on account of her sex?

LIST OF PARTIES

The parties to this proceeding are the petitioner, Cynthia A. Forrester, and the respondent, Judge Howard Lee White.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional Provision and Statute Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	6
I. The Decision Below Conflicts with this Court's Decisions Adopting a "Functional" Approach to Immunity Law	7
II. The Decision Below Conflicts with Decisions of the Eighth and Fifth Circuits Refusing to Extend Absolute Immunity to Personnel Decisions of Governmental Officials	8
Conclusion	11
Appendix:	
A - Opinion of United States Court of Appeals dated June 5, 1986	A-1
B - Judgment of United States Court of Appeals dated June 5, 1986	A-34
C - Judgment of United States District Court dated January 10, 1984	A-36

D - Order of United States District Court dated March 16, 1984 ..... A-38

E - Order of United States District Court dated April 13, 1984 ..... A-49

F - Order of United States Court of Appeals denying petition for rehearing, dated September 11, 1986 ..... A-55

TABLE OF AUTHORITIES

Page

Cases:

Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983) .. 9

Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir. 1986), *cert. pending,* No. 86-547 ..... 6, 10

Clark v. Campbell, 514 F. Supp. 1300 (W.D. Ark. 1981) 9

Cronovich v. Dunn, 573 F. Supp. 1330 (E.D. Mich. 1983) 9

Davis v. Passman, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds,* 571 F.2d 793 (5th Cir. 1978), *rev'd,* 442 U.S. 228 (1979) 6, 9, 10

Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir.), *cert. denied,* 105 S.Ct. 112 (1984) 6, 9

Gravel v. United States, 408 U.S. 606 (1972) 7

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6, 7

Imbler v. Pachtman, 424 U.S. 409 (1976) 7

Lewis v. Blackburn, 555 F. Supp. 713 (W.D. N.C. 1983) 9

Shore v. Howard, 414 F. Supp. 379 (N.D. Tex. 1976)... 9

Stump v. Sparkman, 435 U.S. 349 (1978) 8

Supreme Court of Virginia v. Consumer's Union, 446 U.S. 719 (1980) 8

Constitutional Provisions:

U. S. Constitution Amendment XIV 2

Statutes:

42 U.S.C. Section 1983 ..... 2, 4

No.

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JUDGE HOWARD LEE WHITE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Cynthia A. Forrester respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on June 5, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 792 F.2d 647 (7th Cir. 1986), and is reprinted in the Appendix hereto at p. A-1.

The opinion of the United States District Court for the Southern District of Illinois granting respondent's motion for

summary judgment is unreported. It is reprinted in the Appendix hereto at p. A-49. The opinion of the district court denying respondent's motion for judgment notwithstanding the verdict and granting respondent's motion for a new trial is unreported. It is reprinted in the Appendix hereto at p. A-38.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit which petitioner requests this Court to review was entered June 5, 1986. On September 11, 1986, the court of appeals denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Cynthia Forrester was employed by the Jersey County, Illinois, Circuit Court for three and one-half years. She was hired in April, 1977 as Juvenile and Adult Probation Officer for the Court, and held that position until she was appointed Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project in July of 1979.[1] In the summer of 1980, Ms. Forrester was demoted to a non-supervisory position and on October 1, 1980, she was discharged.

Respondent Judge Howard Lee White, was, at all times material to this dispute, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court of Jersey County. Pursuant to Illinois law, Judge White was authorized to hire and discharge juvenile court probation

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[1] In her position as Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, Ms. Forrester directed a program designed to divert juveniles from the court system. Her duties included administration, community and public relations, and direct intake work with juveniles. During the entire course of her employment, Ms. Forrester also performed juvenile probation work for the Jersey County Circuit Court. Her work as juvenile probation officer included investigation of complaints, referrals to social service agencies and assistance to the State's Attorney in the actual filing of cases. After a case was filed, she made recommendations for disposition and prepared presentence reports. She supervised juveniles on probation and when necessary recommended revocation. See pp. A-2 - A-5 of Appendix hereto.

officers. He was also the designated Project Director of the Juvenile Court Intake and Referral Services Project. Judge White hired Ms. Forrester in 1977, appointed her project supervisor in 1979, and demoted and discharged her in 1980. He was, throughout the course of her employment, Ms. Forrester's direct supervisor.

Ms. Forrester instituted this action in the United States District Court for the Southern District of Illinois, alleging that defendant White demoted and discharged her because of her sex in violation of 42 U.S.C. Section 1983 and the Fourteenth Amendment to the U.S. Constitution.[2]

The case was tried to a jury before U.S. Magistrate Gerald B. Cohn on January 3, 4, 5, 6 and 9, 1984. The jury returned a verdict for Ms. Forrester and against Judge White on Ms. Forrester's claims of sex discrimination and the jury assessed her damages of $81,818.80. Judgment to that effect was entered on January 10, 1984.

By an Order dated March 16, 1984, Magistrate Cohn denied defendant White's Motion for Judgment Notwithstanding the Verdict but granted White's Motion for New Trial.[3]

On March 30, 1984, defendant White filed a Motion for Summary Judgment arguing that the doctrine of judicial immunity barred Ms. Forrester's claim for damages. The Motion was granted and judgment was entered in favor of defendant White on April 13, 1984.

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[2] Claims against other individuals and against Jersey County, as well as claims under other federal statutes have been dismissed from the case.

[3] The Seventh Circuit noted in its opinion that Ms. Forrester's appeal challenges the grant of a new trial as well as the grant of summary judgment. The court of appeals did not, however, reach that issue in view of its decision that defendant White was absolutely immune from civil damage liability. See p. A-6, n.3 of Appendix.

The Court of Appeals for the Seventh Circuit upheld the decision of the District Court. The court ruled, in a decision written by Judge Eschbach with Judge Posner dissenting, that Judge White's decisions to demote and dismiss Ms. Forrester were judicial acts and that even if he had engaged in intentional sex discrimination, Judge White was entitled to absolute judicial immunity. In his opinion, Judge Eschbach wrote that the fundamental factor to consider in deciding whether Judge White was acting in his judicial capacity when he demoted and terminated Ms. Forrester was that "the functions performed by the plaintiff as a probation officer were inextricably tied to discretionary decisions that have consistently been considered judicial acts." See p. A-20 of Appendix hereto.

Pointing out that "the reasoning of the majority opinion extends to every consequential employment decision by every government official", Judge Posner's dissenting opinion argues that the failure to distinguish carefully among the different kinds of acts that judges perform is the fatal weakness of the majority opinion. Hiring and firing of subordinates, he writes, are executive, not judicial, functions. See pp. A-24, A-31 of Appendix hereto.

On September 11, 1986, the Seventh Circuit denied Ms. Forrester's Petition for Rehearing and Suggestion for Rehearing En Banc, with Judges Richard D. Cudahy, Richard A. Posner and Frank H. Easterbrook voting to grant a rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The decisions of this Court have adopted a "functional" approach to immunity law, limiting the defense of absolute official immunity to those situations in which judges, prosecutors and legislators are directly engaged in the function which is to be protected. *Harlow v. Fitzgerald,* 457 U.S. 800 (1981). The decision of the Seventh Circuit in this case conflicts with *Harlow* and other decisions of this Court. It extends judicial immunity to a judge's personnel decisions about a subordinate. Personnel decisions are actions clearly outside of the traditional judicial decision-making function.

A clear conflict also exists among the U.S. Courts of Appeal regarding the question of whether absolute immunity bars suits for damages by employees who have been discriminatorily discharged. In this case and in *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986), *cert. pending,* No. 86-547, the Seventh and D.C. Circuits hold that absolute immunity may bar such suits. These decisions conflict with decisions of the Eighth and Fifth Circuits in *Goodwin v. Circuit Court,* 729 F.2d 541, 548-49 (8th Cir) *cert. denied, 105 S.Ct. 112 (1984) and Davis v. Passman,* 544 F.2d 865 (5th Cir. 1977).[4] The *Goodwin* and *Passman* decisions refuse to extend absolute immunity to personnel decisions of governmental officials.

The Seventh and Eighth Circuit opinions in this case and *Goodwin* present a conflict regarding judicial immunity. The D.C. and Fifth Circuit decisions in *Browning* and *Passman* present a conflict in the law of legislative immunity.

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[4] A decision of the Fifth Circuit *en banc,* 571 F.2d 793 (5th Cir. 1978) dismissed the case on other grounds and thus did not reach the judicial immunity issue. This Court's decision overturning the *en banc* decision of the Court of Appeals for the Fifth Circuit, 442 U.S. 228, (1979) did not reach the immunity question, *Id.* at 235-36, n. 11, but did rule that "if petitioner is able to prevail on the merits, she should be able to redress her injury in damages." *Id.* at 248.

I. The Decision Below Conflicts With This Court's Decisions Adopting A "Functional" Approach To Immunity Law

The decisions of this Court regarding the scope of absolute official immunities to suit have carefully limited judicial, prosecutorial, and legislative immunity to those situations in which a governmental official is directly engaged in the function which is to be protected. In the decision in *Harlow v. Fitzgerald,* 457 U.S. 800, (1981), Justice Powell articulates the general principles governing the Court's rulings in this area:

> . . . in general our cases have followed a *"functional"* approach to immunity law. We have recognized that the judicial, prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant. In *Gravel,* for example, we emphasized that Senators and their aides were absolutely immune only when performing acts legislative in nature and not when taking other acts even "in their official capacity". . . . Out cases involving judges and prosecutors have followed a similar line. *Id.* at 810-11 (citations omitted) (emphasis added)

Harlow is the culmination of the painstaking development by this Court of a coherent body of immunity law. In *Gravel v. United States,* 408 U.S. 606, 625 (1972), this Court held that not all conduct of a legislator is shielded from suit by legislative immunity. Absolute legislative immunity extends only to those activities which are "an integral part of the deliberate, communicative processes" by which legislators participate in proceedings related to consideration and passage or rejection of legislation.

In *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976), this Court explicitly recognized that prosecutorial immunity does not protect every act performed by a prosecutor in carrying out his official responsibilities. Noting that there might be some difficulty in drawing the proper line between functions, the decision states nonetheless that "at sometime, and with respect

to some decisions, the prosecutor no doubt functions as an administrator" and would not be entitled to absolute immunity for such decisions. *Id.* at 431, n. 33.

A similar functional test has been applied by this Court in the area of judicial immunity. In *Stump v. Sparkman,* 435 U.S. 349 (1978), this Court held that a judge is entitled to absolute immunity from liability only for his judicial acts and points out that "whether an act by a judge is a 'judicial' one relates to the nature of the act itself...and to the expectations of the parties." *Id.* at 362. Thus, the test developed by this Court in *Stump* requires a determination whether the act is a function normally performed by a judge and whether the parties dealt with the judge in his judicial capacity. *Id.* at 362.

In *Supreme Court of Virginia v. Consumer's Union,* 446 U.S. 719, 731 (1980) this Court reaffirmed the principle that judicial immunity applies only when judges are engaged in a judicial act. The judges' action complained of in that case did not "arise out of a controversy which must be adjudicated" and was, therefore, not a judicial act. *Id.* at 731. Noting that all official acts performed by judges are not judicial acts, this Court in *Consumers Union* describes judicial acts as "acts of adjudication." *Id.* at 731.

Judge White was not engaged in "acts of adjudication" when he demoted and discharged Cynthia Forrester. When the analysis is focused, as this Court's decisions require that it must be, on the nature of the challenged acts, the inescapable conclusion is that Forrester's demotion and termination were not judicial acts.

II. The Decision Below Conflicts With Decisions of the Eighth and Fifth Circuits Refusing to Extend Absolute Immunity to Personnel Decisions of Governmental Officials.

The narrower, more traditional interpretation of what constitutes a judicial act underlies the Eighth Circuit's holding in

Goodwin v. Circuit Court, 729 F.2d 541, 548-49 (8th Cir.) *cert. denied*, 105 S.Ct. 112 (1984). The Eighth Circuit's decision in *Goodwin* and the Seventh Circuit's decision in this case are in direct conflict.[5]

In *Goodwin*, the Circuit Court of St. Louis County and one of its judges were sued by a court employee who alleged that she was removed from her position as hearing officer for the court's juvenile division and transferred to the division's legal department because of her sex. Goodwin, like the plaintiff in this case, offered advice and made recommendations to the judge in the court where she was employed. The Eighth Circuit ruled that "the decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision." *Goodwin*, 729 F.2d at 549.

The conflict is heightened when the issue is considered in the context of immunity law as a whole. The Seventh Circuit's decision here conflicts with the Fifth Circuit's decision in the legislative immunity context in *Davis v. Passman*, 544 F.2d 865, 877-881 (5th Cir. 1977). In *Passman* the Fifth Circuit ruled that members of Congress are not immune from suit for their deci-

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[5] The decisions of several district courts are similarly in conflict with the Seventh Circuit's decision here. *Shore v. Howard*, 414 F. Supp. 379, 384-86 (N.D. Tex. 1976) (the dismissal of a probation officer is properly characterized as a ministerial or administrative as opposed to judicial act); *Clark v. Campbell*, 514 F. Supp. 1300, 1302-03 (W.D. Ark. 1981) (a county judge in hiring and firing county employees is exercising an administrative function and may not invoke the doctrine of judicial immunity); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D. N.C. 1983) (appointment of magistrates is a ministerial rather than judicial act and not shielded by judicial immunity); *see also, Cronovich v. Dunn*, 573 F. Supp. 1330, 1335-1337, 573 F. Supp. 1342 (E.D. Mich. 1983) (the scope of immunity granted judges in personnel decisions is confused, but personnel actions are performed by judges in the ministerial phase of their executive roles); *contra, Blackwell v. Cook*, 570 F. Supp. 474 (N.D. Ind. 1983) (a judge's dismissal of a probation officer is protected by judicial immunity because of the probation officer's involvement in judicial decision-making).

sions to dismiss staff members. Such decisions, reasoned the Court, are not a part of the deliberative and communicative processes by which legislators consider and pass or reject legislation. *Id.* at 880. This approach parallels the narrower, more traditional approach which focuses on the particular function the immunity is intended to protect. The Fifth Circuit considered and rejected in *Passman, Id.* at 880, n. 25, the rationale of the decision here that personnel decisions regarding staff members who have "meaningful input" into the legislative process should be immune, on the theory that, "The prospect that a dismissal decision will in turn affect the legislative process is also quite remote. These layered causation gaps defeat the argument for absolute immunity."

Passman is in direct conflict in the legislative immunity area with the decision of the D.C. Circuit in *Browning v. Clerk, U.S. House of Representatives,* 789 F.2d 923 (D.C. Cir. 1986), *cert. pending,* No. 86-547. The reasoning of the *Browning* opinion parallels the reasoning in this case, focusing on the involvement of the discharged employee in the legislative process, rather than considering whether a personnel decision is, in itself, a legislative act.

The conflict presented by these cases is clear and requires resolution by this Court.

CONCLUSION

This Court ruled in *Butz v. Economou,* 438 U.S. 478, 507 (1978) that the grant of absolute immunity should be limited to those "*exceptional situations* where it is demonstrated that absolute immunity is *essential* for the conduct of public business." (emphasis added) Judge Eschbach writes that a judge's personnel actions must be shielded by absolute immunity because without the defense, a judge will not be free to act in a principled and independent manner in deciding cases. See pp. A-20 - A-21 of Appendix hereto. However, the Seventh Circuit's ruling in this case fails to further the purpose advanced as its justification.

Under the rule established here, the answer to the question of whether absolute immunity applies will depend on "the nature of the relationship" between the governmental official and the particular employee. See p. A-20 of Appendix hereto. A judge will be required to analyze the duties of each individual employee to determine whether a particular personnel decision is shielded by absolute immunity. Thus, the decision fails to provide judges a clear guide to the potential consequences of their acts.

Without a clear and unambiguous general rule, the extension of absolute immunity to the types of decisions at issue here serves no legitimate purpose. As Judge Posner points out in his dissent:

> "Absolute immunity provides real security only if the scope of the immunity is well defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what. We shall still have to buy liability insurance." See p. A-33 of Appendix hereto.

We are, as Judge Posner reminds in his dissenting opinion, "a society that prides itself on subjecting even its highest officials

to the restraints of the law." See p. A-24 of the Appendix hereto. As the Seventh Circuit majority admits in its opinion, absolute immunity from civil liability for deliberate wrongdoing inevitably results in injustice. See p. A-9 of Appendix hereto. This Court must exercise its authority here to confine such injustice to situations where it is not merely convenient but essential. *Butz v. Economou,* 438 U.S. 478, 507.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARY ANNE SEDEY
(Counsel of Record)
2608 South Kingshighway
St. Louis, Missouri 63139
(314) 773-3566
Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1823

CYNTHIA A. FORRESTER,
Plaintiff-Appellant,

v.

JUDGE HOWARD LEE WHITE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.
No. 82 C 3231—**Gerald B. Cohn,** *Magistrate.*

ARGUED APRIL 24, 1985—DECIDED JUNE 5, 1986

Before ESCHBACH and POSNER, *Circuit Judges, and* TIMBERS, *Senior Circuit Judge.* *

ESCHBACH, *Circuit Judge.* The primary question presented in this appeal is whether the doctrine of judicial immunity shields a state-court judge from liability for damages in a § 1983 action for alleged sex-based discrimination arising from the dismissal of a probation officer. The district court found that the defendant judge was immune. For the reasons stated below, we will affirm.

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* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, sitting by designation.

I

For the purposes of deciding this appeal, the facts may be summarized as follows:

Defendant Howard Lee White was at all times material to this dispute a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and served as Presiding Judge of the Circuit Court in Jersey County, Illinois, which is the state trial court of general jurisdiction for that county. The Chief Judge of the Seventh Judicial Circuit, or his designee, has the authority under Illinois law to hire and dismiss, at his, or his designee's, zleasure, juvenile-court probation officers. Ill. Rev. Stat, ch. 37, ¶¶ 706-1, 706-5(1) (1983). Judge White was acting as the designee of the Chief Judge for the purposes of hiring and firing juvenile-court probation officers.

In April of 1977, Judge White hired plaintiff Cynthia Forrester to serve as a juvenile and adult probation officer and a director of court services for the Circuit Court. She worked under Judge White's direct supervision until her termination. As an adult-probation officer,[1] she prepared pre-sentencing

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[1] The statutory duties of an adult-probation officer are set forth in Ill. Rev. Stat., ch. 38, ¶ 204-4 (1983), as follows:

> (1) To investigate as required by section 5-3-1 of the "Unified Code of Corrections", approved July 26, 1972, as amended, the case of any person to be placed on probation. Full opportunity shall be afforded a probation officer to confer with the person under investigation when such person is in custody.
>
> (2) To notify the court of any previous conviction for crime or previous probation of any defendant invoking the provisions of this act.
>
> (3) All reports and notifications required in this Act to be made by probation officer shall be in writing and shall be filed by the clerk in the respective cases.
>
> (4) To preserve complete and accurate records of cases investigated, including a description of the person investigated, the action of the court with respect to his case and his probation,

reports in all felony cases for the judge to consider, monitored the actions of adults placed on probation, and filed recommen-

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the subsequent history of such person, if he becomes a probationer, during the continuance of his probation, which records shall be opern to inspection by any judge or by any probation officer pursuant to order of court, but shall not be a public record, and its contents shall not be divulged otherwise than as above provided, except upon order of court.

(5) To take charge of and watch over all persons placed on probation under such regulations and for such terms as may be prescribed by the court, and giving to each probationer full instructions as to the terms of his release upon probation and requiring from him such periodical reports as shall keep the officer informed as to his conduct.

(6) To develop and operate programs of reasonable public service work for any persons placed on probation or supervision, providing, however, that no probation officer or any employee of a probation office acting in the course of his official duties shall be liable for any tortious acts of any person placed on probation or supervision as a condition of probation or supervision, except for wilful misconduct or gross negligence on the part of the probation officers or employee.

No person assigned to a public service employment program shall be considered an employee for any purpose, nor shall the county board be obligated to provide any compensation to such person.

(7) When any person on probation removes from the county where his offense was committed, it shall be the duty of the officer under whose care he was placed to report the facts to the probation officer in the county to which the probationer has removed; and it shall thereupon become the duty of such probation officer to take charge of and watch over said probationer the same as if the case originated in that county; and for that purpose he shall have the same power and authority over said probationer as if he had been originally placed in said officer's charge; and such officer shall be required to report in writing once a month the results of his supervision to the probation officer in whose charge the said probationer was originally placed by the court.

(8) To perform such other duties as are provided for in this act or by rules of court and such incidental duties as may be implied from those expressly required.

dations for revocations as necessary. As a juvenile-probation officer,[2] Forrester received and investigated complaints regar-

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[2] The statutory duties of a juvenile-probation officer are set forth in Ill. Rev. Stat., ch. 37, ¶ 706-1 (1983), as follows:

> (a) To receive, investigate and evaluate complaints indicating delinquency, behavior otherwise requiring supervision, neglect or dependency, within the meaning of Sections 2-2 through 2-5; to determine or assist the complainant in determining whether a petition should be filed under Section 4-1 or whether referral to an agency, association or other person or whether some other action is advisable; and to see that the indicating filing, referral or other action is accomplished.
>
> (b) When a petition is filed under Section 4-1, to make prehearing investigations and formulate recommendations to the court.
>
> (c) To counsel and, by order of court, to supervise minors referred to the court; to conduct indicated programs of casework, including referrals for medical and mental health service, organized recreation and job placement for wards of the court and, when appropriate, for members of the family of a ward; to act as liaison officer between the court and agencies or associations to which minors are referred or through which they are placed; when so appointed, to serve as guardian of the person of a ward of the court; to provide probation supervision and protective supervision ordered by the court; and to provide like services to wards and probationers of courts in other counties or jurisdcitions who have lawfully become local residents.
>
> (d) To arrange for placements pursuant to court order.
>
> (e) To assume administrative responsibility for such detention, shelter care and other institutions for minors as the court may operate.
>
> (f) To maintain an adequate system of case records, statistical records, and financial records related to juvenile detention and shelter care and to make reports to the court and other authorized persons, and to other governmental bodies lawfully requiring them.
>
> (g) To perform such other services as may be appropriate to effectuate the purposes of this Act or as may be directed by any order of court made under this Act.

ding status offenders, possible abuse and neglect cases, and juveniles charged with criminal conduct. After an investigation, she referred such cases to social agencies for treatment, provided counseling herself, or worked with the State's Attorney in filing cases in juvenile court. When juvenile court cases were filed, she assisted in preparing them for hearings; in addition, she made recommendations for disposition and prepared presentencing reports for the judge to consider in deciding what should be done with the juvenile. When a juvenile was placed under court supervision or on probation, she monitored the juvenile to assure that he was complying with the terms of court orders. When necessary, she recommended revocations.

Forrester performed these duties until July 1979. At that time, Jersey County received a grant from the State of Illinois to operate the Jersey County Juvenile Court Intake and Referral Services Project. The project was designed to divert juveniles from the court system by providing alternative methods of remedying their problems. When the project started, Judge White appointed Forrester the Project Supervisor and her duties increased commensurably. In this capacity, she was responsible for directing and supervising project staff members, establishing an office and new procedures, maintaining records, making reports, and ensuring that the program met federal and state requirements. She was also required to recruit advocate volunteer counselors to work with juveniles, contract with other social-services agencies, develop a community organization that would provide foster homes, and manage public relations. In addition, Forrester did a large portion of the work with juveniles under the grant project and continued to do juvenile probation work.

White discharged Forrester on October 1, 1980. Forrester also claims that she was improperly demoted prior to her dismissal. We note that the parties presented evidence at trial relating to conflicts between Forrester and a male co-worker and to disputes between Forrester and Judge White regarding Forrester's schedule. These facts, however, are not pertinent to

the disposition of this appeal, because Forrester has alleged that she was discriminated against on the basis of her sex. Thus, in considering the propriety of the district court's decision on judicial immunity, we must assume that Judge White demoted and dismissed Forrester on the basis of her sex. The disputes Forrester may have had with co-workers and Judge White are reasons for her demotion and termination that are not related to her sex, and will not be considered.

In July 1982, Forrester filed an action in federal district court and sought recovery under Title VII of the Civil Rights Act of 1964, as well as 42 U.S.C. §1983 and the Fourteenth Amendment. The procedural history of this litigation is rather involved; much of what transpired below is not relevant to the judicial-immunity question and will not be discussed. Suffice it to say that Forrester pursues on appeal only her § 1983 claim, in which she alleged that she was demoted and terminated by Judge White on the basis of her sex in violation of the equal-protection clause of the Fourteenth Amendment. Although she initially sought both equitable and monetary relief, only her claim for damages remains on appeal.

The § 1983 claim was tried to a jury, which returned a verdict for Forrester and awarded approximately $82,000 in compensatory damages. The district court denied Judge White's motion for judgment notwithstanding the verdict, but granted his motion for a new trial. Judge White then filed a motion for summary judgment in which he argued that he was entitled to absolute immunity from a civil-damage award. The district court agreed and entered judgment in favor of the defendant. Forrester now appeals.[1]

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[1] Forrester challenges both the grant of summary judgment and the grant of a new trial. In view of our decision that the defendant is absolutely immune from civil-damage liability, we express no opinion as to the propriety of the district court's ruling on the defendant's motion for a new trial.

II

In deciding whether the district court correctly ruled in Judge White's favor, we must first consider the general principles behind the immunity defense. Courts in this country and in England have embraced the doctrine of judicial immunity for centuries.[4] The Supreme Court first articulated the current doctrine in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), in which it ruled that, in order to safeguard principled and independent decision-making, a judge may not be held to answer in civil damages for those "judicial acts" committed in the exercise of his "jurisdiction."[5] *See also Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967). The defense does not simply shield judges from civil liability, but also from the related trial proceedings. *Mitchell v. Forsyth*, ___ U.S. ___, 105 S. Ct. 2806, 2816 (1985).[6] It will not however, protect a judge from injunctive relief, *see Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S. Ct. 1970, 1981 (1984), or from criminal prosecution, *see O'Shea v. Littleton*, 414 U.S. 488, 503, 94 S. Ct. 669, 680 (1974); *Ex parte*

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[4] For a discussion of the development of the doctrine in England, see *Pulliam v. Allen*, 466 U.S. 522, 528-36, 104 S. Ct. 1970, 1974-78 (1984).

[5] Prior to *Bradley*, the Court had stated in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868), that judges were not responsible "to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, *unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.*" *Id.* at 537 (emphasis added). In *Bradley*, the court reconsidered that statement and concluded that "the qualifying words used were not necessary to a correct statement of the law." 80 U.S. (13 Wall.) at 351.

[6] It is primarily for this reason that district-court decisions concerning absolute immunity are immediately appealable. *Mitchell v. Forsyth*, ___ U.S. ___, ___, 105 S. Ct. 2806, 2815 (1985).

Virginia, 100 U.S. 339 (1879). In addition, judicial immunity is a creature solely of the common law.[7] However, although it had the constitutional authority to do so, Congress did not abrogate the defense in enacting § 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983. *See Pierson*, 386 U.S. at 554-55, 87 S. Ct. at 1217-18.[8]

The scope of the defense will be construed broadly to effectuate its purposes, *Dykes v. Hosemann*, 776 F.2d 942, 947 (11th Cir. 1985) (en banc) (per curiam), and when it applies, it is absolute and does not depend on the motives of the judge; thus, it is available even if the judge is accused of acting maliciously or corruptly. *Bradley*, 80 U.S. (13 Wall.) at 351; *see also Pierson*, 386 U.S. at 554, 87 S. Ct. at 1218. It must be remembered, however, that it is for the benefit of the public, not corrupt judges. *Pulliam*, 466 U.S. at 532, 104 S. Ct. at 1976; *Bradley*, 80 U.S. (13 Wall.) at 350. As Judge Learned Hand explained in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the in-

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[7] Thus, judicial immunity differs from the immunity afforded members of Congress, as the latter is guaranteed by the Speech or Debate Clause of Art. I, § 6 of the Constitution. *See generally Doe v. McMillan*, 412 U.S. 306, 93 S. Ct. 2018 (1973); *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783 (1951). In addition, judicial immunity affords less protection than legislative immunity under the Speech or Debate Clause. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 30, 101 S. Ct. 183, 187 (1980).

[8] Congress did, however, abrogate the defense for purpose of awarding attorney's fees under 42 U.S.C. § 1988 in cases where prospective injunctive relief against a judge is granted. *See Pulliam v. Allen*, 466 U.S. 522, 543-44, 104 S. Ct. 1970, 1981-82 (1984).

> juries he may so cause; and, if it were possible *in practice* to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

177 F.2d at 581 (emphasis added). *See also McCray v. Maryland,* 456 F.2d 1, 3 (4th Cir. 1972). Thus, the effect of the doctrine may be at times harsh in the individual case, *Stump,* 435 U.S. at 363, 98 S. Ct. at 1108, because conflicting interests define the scope of the immunity. The defense presents a tension between the general and the particular, and demonstrates that, in order to safeguard the judicial system generally, some instances of injustice are, unfortunately, inevitable. *See id.; cf. Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893 (1976); *Stephens v. Heckler,* 766 F.2d 284, 287-88 (7th Cir. 1985).

The Supreme Court in *Bradley* identified five considerations in support of judicial immunity. First a judge must be able to act on his own convictions without apprehension of personal

consequences. Second, because litigation necessarily involves controversy and competing interests, losing parties are quick to ascribe malevolent motives to a judge. Third, because of the ease of alleging bad faith, a qualified "good faith" immunity would be virtually worthless to secure the desideratum of an independent judiciary. Fourth, the prospect of defending civil-damage actions and satisfying judgments would force judges to employ wasteful and distracting devices, such as unnecessarily meticulous record-keeping, to guard against liability and would render judges less inclined to rule forthrightly. Finally, other safeguards, such as appeal and impeachment, reduce the need for private rights of action for damages against judges. *See Bradley,* 80 U.S. (13 Wall.) at 347-54. To these considerations, one should add a sixth: the need to assure quiescence and finality of judgment by reducing the number of possible collateral challenges to judicial decisions. *See Holloway v. Walker,* 765 F.2d 517, 522 (5th Cir.), *cert. denied,* ____ U.S. ____, 106 S. Ct. 605 (1985).

Of course, if the concerns articulated in *Bradley* in favor of immunity were the only ones we should consider, then there would be no countervailing force and immunity should expand to cover all aspects of a judge's life, professional and private. It is undoubtedly vexing for a judge to be named as a defendant in litigation arising out of, for example, an automobile accident or a domestic dispute; thus, immunity would reach these aggravations so that a judge might rule without distraction on the cases before him. However, we must take into account the cost of dismissing meritorious complaints against judicial officers. The case law has drawn a line between those activities implicating the substance of the judge's decision in the cases before him and those that may consume the judge's time, energy, and money, but should not influence the substance of those decisions. *See, e.g., Harris v. Harvey,* 605 F.2d 330, 336 (7th Cir. 1979), *cert. denied,* 445 U.S. 938 (1980); *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974). In sum, immunity does not shield judges from the trials of life generally.

As the discussion above suggests, it is the nature of the act committed (that is, the relation it has to the process of adjudication), not the identity of the actor who commits it, that determines whether immunity applies. *See Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719, 100 S. Ct. 1967 (1980); *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894 (1978); *Stump,* 435 U.S. at 362, 98 S. Ct. at 1107. Using this functional test, the courts have extended absolute immunity to participants (other than judges) in the judicial process and to officials (other than judges) in the judicial process and to officials (other than judges) who carry out "quasi-judicial" functions. The Supreme Court has, for example, granted absolute immunity to federal hearing examiners, administrative law judges, grand jurors, witnesses, and federal and state prosecutors. *See Cleavinger v. Saxner,* ____ U.S. ____, ____, 106 S. Ct. 496, 500 (1985). This court has provided immunity to similarly situated defendants. *See, e.g., Scott v. Schmidt,* 773 F.2d 160 (7th Cir. 1985) (harness racing counsel); *Mother Goose Nursery Schools, Inc. v. Sendak,* 770 F.2d 668 (7th Cir. 1985) (state attorney general when reviewing contracts on behalf of state), *cert. denied,* ____ U.S. ____, 106 S. Ct. 884 (1986); *Trotter v. Klincar,* 748 F.2d 1177 (7th Cir. 1984) (parole board); *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983) (liquor commission); *Ashbrook v. Hoffman,* 617 F.2d 474 (7th Cir. 1980) (state partition commission).

At times the courts have relied on the presence of other controls on judicial action, such as the availability and scope of appellate reveiw, in determining whether to allow the defense. *See, e.g., Cleavinger,* ____ U.S. at ____, 106 S. Ct. at 503-04 (1985); *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894 (1978). However, the full array of alternative procedural safeguards is not a prerequisite to the grant of immunity. *See Stump,* 435 U.S. at 368-69, 98 S. Ct. at 1111 (Stewart, J., dissenting); *Mother Goose,* 770 F.2d at 675 n.6; *Reed,* 704 F.2d at 952. In addition, it has been clear since *Bradley* that an official does not have to serve under terms similar to those of Article III (that is,

by appointment with life tenure and no reduction in compensation) in order to invoke the defense. Indeed, as noted above, absolute immunity has been extended to prosecutors and to grand-jury members, even though both exercise their authority subject to little review and do not enjoy the independence of federal judges. By the same token, no one could reasonably argue that the Justices of the United States Supreme Court are not entitled to absolute judicial immunity, *see Moore v. Burger*, 655 F.2d 1265 (D.C. Cir. 1981), even though their decisions are not subject to review by a superior tribunal. One must at times rely on devices other than Article III and direct appellate review to control judicial action. *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 757-58 & n.39, 102 S. Ct. 2690, 2705 & n.39 (1982).

Thus, the decision to allow the defense of judicial immunity in a particular case calls for a balancing of these competing concerns. *Dennis v. Sparks*, 449 U.S. 24, 31-32, 101 S. Ct. 183, 188 (1980); *Dykes*, 776 F.2d at 942; *Gregory*, 500 F.2d at 63 n.4. The terms "judicial act" and "jurisdiction" are not self-evident, and only signal the conclusion, rather than the beginning, of a chain of inferences. The characterization given an act depends on the weight of the interests at stake. For certain acts, however, such as the rendering of a judgment, the balance is straight-forward and the law, therefore, settled. *See, e.g., Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985). For other acts, a critical evaluation of the concerns underlying the defense is required.

It is not surprising that the plaintiffs in the majority of suits against judicial officers in which the immunity doctrine is successfully invoked are either actual litigants or (as in *Stump*) individuals with an interest in the litigation. In these cases, the concerns of *Bradley* and its progeny are implicated without question. There is another line of cases, however, in which a former employee of a judge brings suit challenging his dismissal. As we will explain below, the rationale of decisions involving disgruntled litigants is not necessarily applicable to those involving former judicial employees.

The federal courts disagree on the scope of the immunity defense for decisions regarding judicial personnel. *See Goodwin v. Circuit Court,* 729 F.2d 541, 548-49 (8th Cir.) (judge's transfer of hearing officer was administrative, not judicial, decision; thus judge not absolutely immune), *cert. denied,* ____ U.S. ____, 105 S. Ct. 112 (1984) and ____ U.S. ____, 105 S. Ct. 1194 (1985); *Laskowski v. Mears,* 600 F. Supp. 1568 (N.D. Ind. 1985) (if relationship with probation officer implicates judge's independence, then dismissal is judicial act); *Cronovich v. Dunn,* 573 F. Supp. 1340, 1342 (E.D. Mich. 1983) (scope of immunity for judges' personnel decision unclear), *Id.,* 573 F. Supp. 1330, 1335 (E.D. Mich. 1983) (failure to appoint plaintiff as Friend of Court not judicial act);*Blackwell v. Cook,* 570 F. Supp. 474 (N.D. Ind. 1983) (judge absolutely immune in § 1983 suit challenging dismissal of family counselor for county probation office); *Lewis v. Blackburn,* 555 F. Supp. 713 (W.D.N.C. 1983) (decision by state judge not to reappoint magistrate not judicial act), *rev'd on other grounds,* 759 F.2d 1171 (4th Cir.), *cert. denied,* ____ U.S. ____, 106 S. Ct. 228 (1985); *Marafino v. St. Louis County Circuit Court,* 537 F. Supp. 206 (E.D. Mo. 1982) (plaintiff who sought position as juvenile-court staff attorney could invoke Title VII in action for discriminatory refusal to hire because staff attorney does not deal with judge in latter's judicial capacity), *aff'd on other grounds,* 707 F.2d 1005 (8th Cir. 1983); *Pruitt v. Kimbrough,* 536 F. Supp. 764 (N.D. Ind. 1982) (state judge immune from damages for dismissal of probation officer), *aff'd mem.,* 705 F.2d 462 (7th Cir. 1983); *Clark v. Campbell,* 514 F. Supp. 1300 (W.D. Ark. 1981) (county judge in hiring and firing county employees, not performing judicial function); *Shore v. Howard,* 414 F. Supp. 379 (N.D. Tex. 1976) (state judge's dismissal of probation officer not judicial act); *cf. Abbott v. Thetford,* 534 F.2d 1101 (5th Cir. 1976) (en banc) (under balancing test of *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731 (1968), judicial officer not liable in civil-rights action challenging discharge of chief probation officer), *cert. denied,* 430 U.S. 954 (1977). This

uncertainty in the case law is understandable, because decisions regarding court personnel depart from the paradigm of *Bradley* and its progeny. However, that does not mean that immunity is not available. It is, for example, of fundamental importance that the modern judge differs from his predecessor in that he must rely more on his staff for advice on substantive decisions, and that certain research functions formerly performed by the judge are now accomplished in part by his staff. A judge's institutional personality, therefore, extends beyond his person. Thus, suits brought by former court personnel may have a powerful, albeit indirect, effect on the rights of litigants. The dispositive question in a particular case is whether that effect bears an appropriate relationship to the judicial process, and hence warrants a grant of immunity.

We pause for a moment to consider the scope of immunity applicable to the personnel decisions of nonjudicial officials. Although the immunity accorded these individuals is not necessarily controlling in the case before us, it may provide strong support for our ruling, if that immunity is shaped and informed by a similar rationale. In *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S. Ct. 2690 (1982), for example, the Supreme Court held that the President was absolutely immune from suits based on his personnel decisions. The Court also noted in a related action, *Harlow v. Fitzgerald,* 457 U.S. 800, 811-13, 102 S. Ct. 2727, 2735-36 (1982), that presidential aides might, under certain circumstances, enjoy the same immunity for these decisions.

With reference to legislators, the Court has not provided a definitive ruling. In *Davis v. Passman,* 442 U.S. 28, 99 S. Ct. 2264 (1979), a former congressional staff member alleged that a United States Congressman had, in violation of the Fifth Amendment, discriminated on the basis of sex in terminating her. The Court concluded that the plaintiff was asserting a constitutionally protected right, that he complaint stated a case of action, and that damages were the appropriate remedy.

Nonetheless, it was at pains to point out that, while upholding the complaint, it expressed no opinion on the possible immunity defenses of the defendant Congressman. *See* 442 U.S. at 236 n.11, 246 n.25, 249, 99 S. Ct. at 2272 n.11, 2278 n.25, 2279. *Cf. Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 397-98, 91 S. Ct. 1999, 2005 (1971) (ruling on immunity reserved).

In *Browning v. Clerk,* No. 85-5144 (D.C. Cir. Apr. 25, 1986), the District of Columbia Circuit addressed the question left unanswered in *Davis.* In *Browning,* the former Official Reporter of the United States House of Representatives brought a civil-rights action in which she alleged that her termination was motivated by a racial animus. The court, in holding that the Speech or Debate Clause provided the defendants, members of the United States House of Representatives, with absolute immunity for this personnel decision, stated:

> The touchstone in determining whether the Speech or Debate Clause immunity attaches is whether the activities at issue were "an integral part of the deliberative and communicative processes [of Congress]," ...such that the activity is legislative in character. Personnel decisions are an integral part of the legislative process....Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions," personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

Slip op. at 12 (citations omitted). The court found that the plaintiff's duties were directly related to the "due functioning of the legislative process," so that the decision to discharge her was legislative in nature and, thus, immunized by the Clause. Similarly, the First Circuit held in *Agromayer v. Colberg,* 738 F.2d 55 (1st Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 515 (1984), that the defendant, the President of the Puerto Rico House of Representatives, had absolute legislative immunity under the common law in an action challenging his refusal to hire the plaintiff to serve as a press officer. *See also Hudson v.*

Burke, 617 F. Supp. 1501 (N.D. Ill. 1985); *cf.* 42 U.S.C. § 2000e(f); *Clark v. Tarrant County,* 608 F. Supp. 209, 212-14 (N.D. Tex. 1985).

Thus, far from placing the judicial branch above the executive and legislative branches, a decision today in favor of the defendant would do no more than extend to the judiciary the immunity from civil damages arising out of certain personnel decisions that is already enjoyed by the coordinate branches. Separation-of-powers concerns are, of course, a component of the judicial decisions relating to the personnel actions of the federal executive and legislative branches (and might result in a more comprehensive immunity for those branches than that accorded the judiciary). By the same token, questions of comity and federalism are raised in federal suits against state officials. In any event, the unifying rationale is that, if an employee's duties are intimately related to the functioning of the particular process (whether executive, legislative, or judicial on either the federal or state level), then personnel decisions regarding that employee are also part of the process.

We turn now to the facts of this case. The plaintiff alleges that she was discharged on the basis of her sex. The first question usually addressed in deciding whether a judge may invoke the defense of judicial immunity is whether he was acting within his "jurisdiction." *See Stump,* 435 U.S. at 356, 98 S. Ct. at 1104-05. As noted earlier, this is not a self-defining term. In the case of a disgruntled litigant, the question is whether the judge had jurisdiction over the subject matter of the dispute. *Id.; Dykes,* 776 F.2d at 945-50. It is clear, nontheless, that a judge may be acting within his jurisdiction outside, as well as inside, the courtroom. *See, e.g., Lopez v. Vanderwater,* 620 F.2d 1229, 1234 (7th Cir.), *cert. dismissed,* 449 U.S. 1028 (1980).

The plaintiff's claim in the instant case, however, did not arise directly out of litigation before the court, so the question of subject-matter jurisdiction makes little sense. Still, that does

not foreclose the defense in this case, because we believe that the more general concern articulated in *Bradley* and its progeny is whether the judge was acting within the scope of his "authority." It has been clear since the doctrine's inception that, if a judicial officer is acting in a clear absence of power, immunity will not spare him from the consequences of his acts. *See Bradley,* 80 U.S. (13 Wall.) at 352; *see also Gregory,* 500 F.2d 59. This is the only aspect of the doctrine that has anything resembling a "good faith" component. In the case of litigants, subject-matter jurisdiction defines the specific scope of that general authority. In the context of the dismissal of a staff member, it is our opinion that the threshold question is this. was the judge *authorized* to discharge the plaintiff? The answer in this case is an unqualified yes. In fact, under Illinois law, judges alone are authorized to dismiss juvenile-probation officers.

The more difficult question, of course, is whether the dismissal of the plaintiff was a "judicial act." Again, this is not a self-defining term. It is too much to say that judicial acts are those things that judges do. Such a definition is not only circular, but also results in an unnecessary extension of the immunity doctrine, because it would shield a judge from personnel actions unrelated to the decisional process. An example would be the refusal to hire an individual to serve as a janitor. The reasons supporting judicial immunity are not properly implicated in such a case, even though a judge's apprehension of the possibility of a civil-damage action arising out of the refusal to hire a janitor may affect his mood and distract him from the tasks at hand (and, therefore, affect the rights of the litigants before him). As noted above, it cannot be the idiosyncracies of a particular judge, or even those of human nature generally, that warrant the application of judicial immunity. Rather, the critical inquiry is whether the person affected by the judge's acts stands in such a relationship to the judicial system as would make immunity appropriate in light of the concerns expressed above. A janitor is not required to provide a judge with advice

and information concerning pending cases. Thus, judicial immunity would not protect the judge who refuses to hire an individual to be a janitor.[9]

The Supreme Court in *Stump* developed a two-part test to determine whether a judicial act was at issue. Although articulated in an action brought by a party involved in litigation before the defendant judge, this test addresses the general concerns behind the defense, and there is no reason why it should not apply in the instant case. First, was the function one normally performed by a judge? Second, was the plaintiff dealing with the judge in his judicial capacity? 435 U.S. at 362, 98 S. Ct. at 1107. The answer to the first prong of the inquiry was adumbrated above: under Illinois law, only a judge may order the dismissal of the plaintiff; thus, this function is "normally performed by a judge."

The second prong is troublesome. It is true that judges are protected only when they are acting as "judges," not as administrators.[10] However, saying that something is an administrative act, as opposed to a judicial one, simply states the

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[9] By the same token, absolute immunity should not bar a damage action challenging a judge's dismissal of, for example, a court reporter or bailiff. The relationship between a judge and such an employee is perhaps most accurately characterized as "administrative," *i.e.*, one unrelated to the exercise of the judge's discretion. Because a court reporter or bailiff is not as a general matter required to provide a judge with information and advice regarding the substance of the litigation before the court, so that discord between the employer and employee would not implicate the judge's institutional rile within the court system, the defense of absolute immunity would be inappropriate. *Cf. Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 512 (1984).

[10] *See Stump v. Sparkman*, 435 U.S. 349, 361 n.10, 98 S. Ct. 1099, 1107 n.10 (1978) (discussing *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), and *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970)); *see also Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985) (judicial immunity does not apply to ministerial acts) (citing *Ex parte Virginia*, 100 U.S. 339 (1879)).

conclusion. Certain decisions made by judges outside the courtroom may be administrative in one setting and judicial in another. There is substantial overlap between the two, and the characterization cannot be made without reference to the purposes of immunity.

State law often provides an answer. As suggested above, it may determine, for example, who is in fact a "judge." However, while state law may conclusively determine when a judge is *not* entitled to immunity, *see, e.g., Clark v. Campbell,* 514 F. Supp. 1300 (W.D. Ark. 1981), it does not always determine when a judge *is* entitled to immunity, because a state may assign a task to a judge for reasons unrelated to safeguarding principled and independent decision-making.

The assignment under Illinois law to judges of supervision over probation officers is, we believe, directly related to the principles underlying the defense of immunity. There is no question that, in her capacity as a probation officer, the plaintiff was dealing with the defendant in the latter's capacity as a judge. She was rendering advice and recommendations for dispositions to be made by the judge, and the information she provided directly implicated the exercise of the judge's discretionary judgment. *See Abbott,* 534 F.2d 1101; *Pruitt,* 536 F. Supp. 764. Decisions regarding, for example, sentencing, probation, and the revocation of parole and probation are unquestionably judicial acts, and the plaintiff provided crucial advice and information necessary to making those decisions. Her relationship was by necessity founded on confidence and confidentiality. These attributes of the position are the primary reasons that probation officers themselves have derivative absolute immunity. *See Spaulding v. Nielsen,* 599 F.2d 728 (5th Cir. 1979) (probation officer immune from damages for alleged misconduct in investigation and preparation of pre-sentence report); *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970) (probation officer has derivative judicial immunity), *cert. denied,* 403 U.S. 908 (1971); *Blackwell,* 570 F. Supp. at 478-79 (immunity of pro-

bation officers); *Richardson v. Grundel*, 85 Ill. App. 3d 46, 406 N.E.2d 575 (1980) (immunity of probation officer under Illinois law); *see also Scott v. Dixon*, 720 F.2d 1542 (11th Cir. 1983) (immunity of court clerk), *cert. denied*, ____ U.S. ____, 105 S. Ct. 122 (1984); *Briscoe v. Lahue*, 663 F.2d 713, 722 (7th Cir. 1981) (immunity of court reporter), *aff'd on other grounds*, 460 U.S. 325, 103 S. Ct. 1108 (1983); *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969) (immunity of court clerk and reporter).[11]

The fact that the functions performed by the plaintiff as a probation officer were inextricably tied to discretionary decisions that have consistently been considered judicial acts is the fundamental factor to consider in deciding whether the defendant was acting in a judicial capacity when he demoted and terminated the plaintiff. *See Lewis*, 555 F. Supp. 713; *Marafino*, 537 F. Supp. 206; *Pruitt*, 536 F. Supp. 764. We stress, however, that the nature of this relationship depends on the facts of each case. We cannot set forth a general rule, because the interaction between the judge and the members of his staff does not always appropriately implicate the decisions of the judge *qua* judge. *See Goodwin*, 729 F.2d at 548-49 (relationship between judge and hearing officer too distant to implicate substance of judge's decisions). Each court system differs in the manner in which it allocates responsibility to court personnel. However, because the employment relationship at issue here was dominated by acts that were unquestionably taken in the defendant's judicial capacity within the meaning of *Bradley*, *Stump*, and their progeny, the contested actions of the defendant in demoting and dismissing the plaintiff would affect his ability to act in a prin-

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[11] This is not to suggest that a judge would be immune in every damage action brought by a former employee who enjoyed derivative immunity while working for the judge. However, it is unlikely that a judge would be immune in an action brought by an employee who did *not* have derivative immunity, because the lack of derivative immunity indicates that the employee was removed from the discretionary decision-making process.

cipled and independent manner in his role as a judge if he could not undertake those actions without the protection of the defense. We conclude, therefore, that he is entitled to absolute immunity from civil damages in this case.

The evil to be avoided is the following: A judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decision-making will decline. In this case, four of the five factors discussed in *Bradley* are directly implicated. First, the judge will not be able to act on his convictions in deciding cases, because he will not have the aid of a probation officer in whom he has trust and confidence. Second, he will be driven to wasteful self-protective devices. Third, alternative safeguards, such as impeachment, censure, equitable and declaratoy relief, and market forces, reduce the need for a private damage action. Finally, the ease of alleging bad faith in the demotion and dismissal renders good-faith immunity virtually worthless. The judge may also be open to suits from litigants who discover that his professional relationship with his probation officer has declined, and he may thus expose himself to charges of impropriety and lose the respect necessary for the effective discharge of his responsibilities.

One could say a conscientious judge would act on his convictions and discharge the employee, but this is an argument against immunity in its entirety. The defense reflects a general recognition that, by his elevation to the bench, a judge cannot always rise above the frailties he shares with those individuals the proriety of whose conduct he is now called upon to judge. If similarly situated litigants were always similarly judged, perfect procedural justice would obtain. This, however, is not the world in which we find ourselves. Doctrines such as judicial immunity are needed to promote the effective administration of our legal system, and in attempting to fashion a system of "justice for all" we cannot guarantee justice for each. The

meritorious claims of some who are adversely affected by improper judicial decisions are swept aside with the meritless ones. The tribute thereby exacted is a consequence of having human acts judged by human actors.

The defense, however, will not protect a judge from his intemperate acts in every instance. Only when his conduct occurs in a context in which even the properly motivated judge would be reluctant to act without protection from a civil-damage action and when that reluctance would undermine the integrity of the general process of judicial administration is immunity appropriate. This is such a case.

To summarize, we hold that the defendant's decisions to demote and dismiss the plaintiff were judicial acts performed within the scope of his authority. He is then, under the facts of this case, entitled to the defense of judicial immunity. We, of course, express no opinion on other decisions relating to Judge White's staff or even to probation officers in a different court system, because it must be determined in each case that the grant of immunity advances the policies behind it. We have, as we must, addressed only the facts of the case before us.

III

For the reasons stated above, the judgment of the district court is AFFIRMED.

POSNER, *Circuit Judge*, dissenting. Section 1 of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983) creates a federal tort remedy against persons who violate federal rights under color of state law. The state does not mention immunity or other defenses to liability, but this just shows (as is anyway obvious) that the statute was not intended to be a complete code of tort liability. Procedures, remedies, defenses have to be grafted on; whether one calls the process of completing the statute interpretation, or common law elaboration, or policymaking (see *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissen-

ting)), the objective is the same—to integrate the statute into a system of liability and remedies in which due regard is paid to all relevant considerations, including the impact of liability on the performance of essential public functions.

Today my brethren hold that a state judge can never be made to pay damages for firing a probation officer in violation of the officer's constitutional rights; the judge's immunity is absolute. My brethren emphasize that a judge exposed to the threat of being sued for damages may hestitate to fire an incompetent probation officer, and that the public will suffer from his hesitation. Most members of a judge's staff serve for a short time (this is true of most law clerks), do not perform essential services, or lack discretionary authority. So in the generality of cases the harm to the public if a judge is inhibited by fear of being sued from firing an incompetent staff member is clearly not great enough to justify giving him absolute immunity from suit. But in the case of probation officers and other judicial or quasi-judicial employees who are selected by judges—such as (in the federal system) magistrates and bankruptcy judges—the harm to the public if a judge is led to retain an unqualified employee by fear of being sued could be very serious.

Forceful as this point is, it does not justify giving judges absolute immunity from liability for firing a probation officer in violation of the Constitution, even when the point is combined with another that my brethren but hint at. There are administrative and judicial remedies, particularly under Title VII of the Civil Rights Act of 1964, as amended in 1972 to cover public employers, see 42 U.S.C. §§ 2000e(a), (b), 2000e-2(a), for some forms of employment discrimination by such employers, so that granting a state judge absolute immunity for such discrimination would not leave his victims completely without remedy. The second point is incomplete; the probation officer would have no remedy if he were fired for an unconstitutional reason for which Title VII or other statutes provided no remedy against the employing agency. The deeper problem is that both

points are applicable to a wide range of official conduct that has been held not to be protected by absolute immunity: a police chief's decision to fire a police lieutenant, for example.

Indeed the reasoning of the majority opinion extends to every consequential employment decision by every government official. The opinion cannot logically be confined to firing, although it carefully avoids any reference to failing or refusing to hire. Hiring an unqualified person because of fear that one might otherwise be sued for discrimination is no different from firing an unqualified person because of the same fear. It would be a curious notion that a judge must hire probation officers without regard to their race or sex but is free to fire them on the basis of their race or sex. The majority opinion cannot logically be confined to the hiring and firing of probation officers or other judicial or quasi-judicial personnel, either. Incompetent employees of other branches of government besides the judicial can do just as much harm to the public; and it does not follow that because a probation officer can be said to perform quasi-judicial acts, firing that officer is a judicial act, even if it is done by a judge. Finally, the emphasis that my brethren place on the confidential nature of the relationship between judge and probation officer would be relevant only if the judge were charged with having fired the probation officer on political grounds. See, e.g., *Soderbeck v. Burnett County,* 752 F.2d 285, 288 (7th Cir. 1985). Even then it might very well not be determinative. See, e.g., *Branti v. Finkel,* 445 U.S. 507 (1980) (assistant public defender).

In a society that prides itself on subjecting even its highest officials to the restraints of law (see, e.g., *Butz v. Economou,* 438 U.S. 478, 506 (1978)), a position historically novel and still far from universal, the grant of absolute immunity from civil liability—immunity, that is to say, from such liability even for deliberate wrongdoing—must be confined to situations where such immunity is not merely convenient but essential. *Id.* at 507. And in deciding whether this demanding test has been met

federal judges must be sensitive to the accusation of arbitrarily exempting themselves from liabilities which they have imposed in the name of the Constitution on other public officials, state and federal. The present case concerns state judges sued under section 1983 but its logic applies with equal force to federal judges sued directly under the Constitution. It thus engenders tension with *Davis v. Passman,* 442 U.S. 228 (1979). The Supreme Court held in that case that a Congressman could be sued for damages directly under the Constitution for firing his deputy administrative assistant because she was a woman. Although the Court reserved certain immunity questions, it said that "if petitioner is able to prevail on the merits, she should be able to redress her injury in damages." *Id.* at 248. The same thing can be said about a probation officer fired by a judge. It is true that the District of Columbia Circuit held recently that the Constitution's "speech and debate clause" (Art. I, § 6) immunizes members of Congress from liability in damages for firing an employee whose "duties are an integral part of the legislative process." *Browning v. Clerk,* No. 85-5144, slip op. at 12 (D.C. Cir. April 25, 1986). But even if this holding is correct, it is correct in virtue of an explicit constitutional provision that has no counterpart so far as judges are concerned; and we are not authorized to repair the oversights of the Constitution's framers.

As my brethren recognize, the purpose of absolute immunity is not to make life easy for officials of any branch of government; it is not to foster judicial peace of mind. We must not allow our vocationally sharpened sensitivity to the difficulties of performing judicial duties in this contentious era to influence us to immunize ourselves and other judges from the legal hazards of public office. The only tenable rationale of absolute immunity is the need to protect officials from being seriously deflected from the effective performance of their duties. Absolute immunity is strong medicine, justified only when the danger of such deflection is very great. Analysis thus requires careful attention to the tradeoffs involved in a judgment to grant absolute

immunity. A lawsuit imposes costs even on a prevailing defendant, who generally cannot recover his attorney's fees; in addition some defendants who ought to win their suits lose them simply because the judicial system like most other human institutions makes mistakes. So every individual has an incentive to avoid conduct that will get him sued; but the conduct he avoids may be conduct that promotes the welfare of society, and if so the incentive will have socially costly consequences. These costs have to be balanced against those of letting wrongdoers get off scot-free. Ordinarily the latter costs are thought greater but not when (1) the nature of the potential defendant's job is such that he can be expected to be sued constantly, (2) most such suits will be frivolous, (3) the defendant can reduce the probability of being sued by taking measures to avoid exposure to suit, (4) those measures are, however, socially costly because of the nature of the defendant's work, and (5) the victims of his wrongdoing have other remedies.

These conditions coalesce in the case of a judge sued for judicial rulings, or a prosecutor for decisions whether to prosecute, or a legislator for legislation — and judges, prosecutors, and legislators, and officials acting in these capacities though not called such (including ad hoc judges, such as jurors), are (apart from the President of the United States) the principal officials who enjoy absolute immunity from federal civil liability. See, e.g., *Cleavinger v. Saxner*, 106 S. Ct. 496, 500 (1985); *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2812 (1985); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-36 (1980). Witnesses are absolutely immune for similar reasons. The absolute immunity of judges from civil liability for their rulings has been an established principle of Anglo-American jurisprudence for hundreds of years. See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-54 (1872), and cases cited there; Note, *Pulliam v. Allen: Delineating the Immunity of Judges From Prospective Relief*, 34 Cath.U.L.Rev. 829, 838-43 (1985). It was held applicable to suits under section 1983 in *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). But there is

nothing in this history to suggest that judicial immunity extends beyond judicial rulings.

The business of a judge is to rule against people. Every contested case has a loser, ofter a sore one. And the class of litigious people is of course overrepresented in litigation, meaning that the loser of a lawsuit is more likely (if permitted) to vent his anger by bringing another lawsuit than would the average loser of a nonlegal contest. A judge of this court votes in more than 200 cases a year, and every (nondissenting) vote produces a loser. A significant fraction of the losers would sue the judges if they could do so (some sue us despite our absolute immunity). The vast majority of such suits would be frivolous, for they would be efforts to attack a final judgment collaterally by attacking the judge, a mode of collateral attack that would not be tolerated even if judges were not completely immune from being sued for damages for their judicial rulings. Nevertheless these suits would be costly in the aggregate and could lead to measures of avoidance of various sorts. Some people would decline to become judges, though well qualified. Others would pull their punches in cases where one of the litigants seemed particularly irate or contentious. Others would try to duck cases involving such litigants. For none of these techniques of avoidance would there be effective remedies. People who are scared of being sued cannot be forced to serve as judges. Nor will taxpayers raise judicial salaries high enough to compensate judges for running the grave litigation risks they would run in having to judge without immunity from liability for their rulings. And because judges exercise great discretion (despite the pious insistence that ours is a government of laws not men), judicial timidity is hard to prove and even harder to punish. Many judges, including all federal judges, are beyond the power of correction by the political branches of government and thus can pull their punches to their hearts' content. Finally, the victim of a wrongful judicial ruling ordinarily has a remedy by way of appeal to a higher court.

The case for granting judges absolute immunity for their judicial rulings is thus a powerful one, but one not easily transposed to judges' decisions on staffing their chambers. Consider the compact statement of the rationale for absolute judicial immunity in *Pierson v. Ray, supra:* "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that are brought before him, including controversial cases that arouse the most intense feeling in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U.S. at 554. Notice how the entire discussion is geared to the judge's role in making judicial decisions. If there is a case for absolute immunity from civil liability for judges' employment decisions, it is a completely different case from the traditional one. The decision today breaks new ground; and novelty is not always a virtue in law.

Absolute immunity as traditionally conceived (I mean the judge-made doctrine, not the absolute immunity that federal legislators enjoy by virtue of the speech and debate clause in Article I) is limited to the situation where an official's position requires that he be constantly hurting members of the public—so that if he is not immune he will be a constant target of litigation—and where in addition massive litigation or its threat is likely to distort his official behavior, to the serious detriment of the public. This describes the position of judges in rendering judicial decisions and of prosecutors in prosecuting. But no one thinks that a state or federal district attorney should be absolutely immune from liability for discriminating in the hiring or firing of assistant district attorneys; and why should there be a different rule for judges who discriminate in hiring or firing their subordinates? A district attorney may be responsible for initiating hundreds or even thousands of prosecutions in the course of a year, and every one would be a potential lawsuit

against him if it were not for absolute immunity. Prosecutors enjoy a broad, essentially unreviewable discretion in deciding whom to prosecute, while judges enjoy a broad discretion, too—discretion to decide cases plausibly for either party. Many judges (all federal judges) are in addition protected from removal by the other branches of government. If either type of official is made timid by fear of being sued and his performance suffers as a result, the public will not be the wiser; even if it is, it may not be able to do anything to whip the official back into line. But a prosecutor or judge is not more likely to be sued for employment discrimination than any other employer, public or private. Cf. *Mitchell v. Forsyth, supra,* 105 S. Ct., at 2813. He does not face an avalanche of lawsuits if absolute immunity is denied; and his employment decisions are, if not fully subject to outside evaluations, less inscrutable than prosecutorial and adjudicative decisions, or at least no more inscrutable than the employment decisions of other officials.

It is true that so far as potential exposure to suit by members of the public is concerned, a policeman is in much the same position as a judge or prosecutor yet enjoys no absolute immunity from civil damage actions. There are reasons for the difference in treatment. One, which is merely realistic, is that a policeman rarely has sufficient assets to be worth suing (of course this is also true of many assistant district attorneys), unless he is indemnified by his employer—in which event the suit is unlikely to have much impact on his performance of his duties. The threat of suit is less likely to affect the performance of his duties for another reason as well: he has less discretion than a judge or prosecutor. He is also more amenable to discipline and control by his superiors if he seems to be flagging. Finally, unless policemen can be sued for using excessive force or for false arrest, many victims of these excesses will be without any remedy. In contrast, judicial decisions are subject to appeal and prosecutorial decisions are subject to correction by grand juries, petit juries, trial judges, and appellate judges.

Granted, a public employee who has been fired may have alternative remedies to a suit for damages, a fact that might seem to make him more like the loser of a lawsuit than like the victim of police brutality. A probation officer fired on grounds of race or sex has no right of appeal but does have administrative and judicial remedies against the employing agency (i.e., the court rather than the judge). These remedies are limited, most importantly in allowing only equitable relief: the fired employee can get reinstatement with back pay but cannot get common law damages. But the loser of a lawsuit cannot get common law damages either; he can only get a reversal on appeal. In any event, the absolute immunity of judges cannot be made to depend on the accident that a legislature has created an alternative remedy, for it is not something that distinguishes a judge from any other public employer.

If I did not have absolute immunity for my judicial rulings I would be enveloped in a cloud of litigation that my estate would still be defending long after my death. But I have never thought I had absolute immunity for employment decisions, including decisions on bankruptcy judges in which I participate as a member of the Seventh Circuit's Judicial Council. Judges do not need such an immunity in order to perform their duties effectively. Without it there may be some diminution in our effectiveness but not enough to justify absolute immunity if I am right that it can be granted consistently with our traditions only when the circumstances are compelling. Some evidence that we need not fear a flood of lawsuits if the district court's decision is affirmed is that this appears to be the first case in which a judge's absolute immunity from damage liability for employment discrimination has even been argued at the federal appellate level; it was not argued in *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 545-46 (8th Cir. 1984), where the Eighth Circuit recently upheld a damage judgement against a state judge for removing a hearing officer because of her sex. That case might have been decided differently if a litigant had sued the judge for having fired the hearing officer, for in rela-

tion to litigants the employment decisions of judges may be the sort of judicial act to which absolute immunity attaches; but in relation to the employee or job applicant, employment discrimination by a judge does not engage the policy behind the doctrine of absolute judicial immunity.

The failure to distinguish carefully among the different kinds of acts that judges perform is, indeed, the fatal weakness in the majority opinion. Carried to its logical extreme, the opinion would attach absolute immunity to any major decision made by a judge within the scope of his lawful powers. The proper question is whether the decision was made in the judge's judicial capacity. Judges have both judicial and executive functions. The basic distinction is well established in the cases. See *Stump v. Sparkman,* 435 U.S. 349, 362 (1978); *Lopez v. Vanderwater,* 620 F.2d 1229, 1233-35 (7th Cir. 1980); *Harris v. Deveaux,* 780 F.2d 911, 914-16 (11th Cir. 1986); *Dykes v. Hosemann,* 776 F.2d 942, 945 (11th Cir. 1985) (en banc) (per curiam); *Holloway v. Walker,* 765 F.2d 517, 522-25 (5th Cir. 1985); *Richardson v. Koshiba,* 693 F.2d 911, 913-15 (9th Cir. 1982); Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?,* 53 Fordham L. Rev. 1503 (1985). As the Ninth Circuit said in *Gregory v. Thompson,* 500 F.2d 59, 65 (9th Cir. 1974), where the defendant, a judge, had forcibly expelled the plaintiff from the judge's courtroom, "Judge Thompson's choice to perform an act similar to that normally performed by a sheriff or bailiff should not result in his receiving absolute immunity for this act simply because he was a judge at the time." See also *Ammons v. Baldwin,* 705 F.2d 1445, 1448 (5th Cir. 1983). Or as we said in both *Lowe v. Letsinger,* 772 F.2d 308, 311-12 (7th Cir. 1985), and *Glick v. Gutbrod,* 782 F.2d 754, 756 (7th Cir. 1986) (per curiam), "The doctrine [of absolute immunity] applies to damage claims, ... but not to ministerial or administrative acts."

I realize that the line between the judicial and the administrative is not hard and fast; the rulings that a judge makes in the course of "administering" a school system or prison

system under a consent decree are entitled to absolute immunity. *Holloway v. Walker, supra,* 765 F.2d at 525. I recognize the hint—no more—in *Richardson v. Koshiba, supra,* 693 F.2d at 914 n. 10, that the classification of the act is determined by the office of the actor rather than the nature of the act. I realize that the cases I have cited are not factually similar to the present one—except for one, but as it is a decision of the Supreme Court, though an old one, we should pay particular attention to it. In *Ex Parte Virginia,* 100 U.S. 339 (1880), a county judge was indicted for racial discrimination in slecting jurors to serve in the county's courts. To the judge's argument that he was immune from such a prosecution the Court answered in words applicable to the present case, "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc," *id.* at 348—and probation officers. This was said in the context of a criminal prosecution but it would be surprising if a suit for civil damages brought by the prospective jurors whom the judge had discriminated against would have been deemed barred by the doctrine of absolute immunity.

My brethren would give judges more protection than other officials not because of the acts that they do which are distinctively judicial (for I contend that firing a subordinate, even a judicial subordinate, is not a distinctively judicial act) but just because they are judges. The same racial or sexual or age discrimination in firing a probation officer is to be immunized from civil liability if the person doing the firing is a judge, and is not to be immunized if the person is another probation officer, or some other executive officer, or a judicial administrator, or in short anyone who does not himself perform—though of course not in the act of hiring or firing—a judicial function.

So I think my brethren are wrong to grant Judge White absolute immunity, and I would reverse the judgment of the district court. But I also think that the protection against suit that the majority opinion creates is illusory. The majority is so intent on writing a narrow opinion that it leaves the scope of its new doctrine of absolute immunity entirely uncertain. Can it really be that the doctrine is to be limited to the firing of probation officers in Illinois juvenile courts? The logic of the opinion cuts a much broader swath, but judges cannot be (perhaps should not be) forced to apply principles in their full logical reach. The majority calls for "a critical evaluation of the concerns underlying the defense" of absolute immunity in each case; it declines to express any "opinion on other decisions relating to Judge White's staff or even to probation officers in a different court system, because it must be determined in each case that the grant of immunity advances the policies behind it." It is right for judges to be cautious when they set sail on uncharted seas, but in the field of immunities this may be a reason for not leaving port in the first place. The absolute immunity for a judge's legal rulings is about as definite a rule as we have in our legal system, and the absolute immunity that the court creates today is about as indefinite, which robs the principle of its value to the judges and to the public. Absolute immunity provides real security only if the scope of the immunity is well defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what. We shall still have to buy liability insurance.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois
June 5, 1986

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WILLIAM H. TIMBERS, Senior Circuit Judge*

No. 84-1823

CYNTHIA A. FORRESTER,
Plaintiff-Appellant,

vs.

JUDGE HOWARD LEE WHITE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.

No. 82 C 3231

Gerald B. Cohn, Magistrate

JUDGMENT — ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Southern District of Illinois, East St. Louis Division, and was argued by counsel.

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* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 82-3231

CYNTHIA FORRESTER

vs.

JUDGE HOWARD LEE WHITE

Gerald B. Cohn, U. S. Magistrate

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered in favor of the plaintiff CYNTHIA FORRESTER, and against the defendant, JUDGE HOWARD LEE WHITE, on plaintiff's claim for discrimination in being demoted from Supervisor to Intake Worker.

IT IS FURTHER ORDERED that Judgment is hereby entered in favor of the plaintiff and against the defendant on plaintiff's claim for discrimination in her termination from employment.

IT IS FURTHER ORDERED that on Plaintiff's claim against the Defendant for discrimination in the termination of her employment, damages are assessed as follows: (1) the value of wages lost minus plaintiff's interim earnings and unemployment compensation — $23,555.00; (2) the value of pension con-

tributions lost — $2,106.80; (3) the value of credits to be applied for reduction of student loans which were lost — $407.00; (4) the value of reasonable expenses incurred by plaintiff in her search for employment — $750.00; (5) the humiliation and embarrassment experienced as a result of defendant's conduct — $35,000.00; the anxiety, pain and suffering experienced as a result of defendant's conduct — $15,000.00, for a total of $76,818.80 as to that claim.

IT IS FURTHER ORDERED that on Plaintiff's claim against the defendant for discrimination in being demoted, damages are assessed as follows: (1) the humiliation and embarrassment experienced as a result of defendant's conduct — $3,800.00; (2) the anxiety, pain and suffering experienced as a result of defendant's conduct — $1,200.00.

Clerk, A. Marvin Helart, Clerk

By /s/ Sandra Pannier
Deputy Clerk

Date: January 10, 1984

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 82-3231

CYNTHIA A. FORRESTER,
Plaintiff,

vs.

HOWARD LEE WHITE,
Defendant.

ORDER

Before the Court is the defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, filed on January 20, 1984, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The plaintiff has responded with a Memorandum in Opposition to said Motion.

We note at the outset that all parties have consented to the final entry of judgment in this case by a United States Magistrate, pursuant to 28 U.S.C. § 636(c). An Order of Reference to this effect was entered by Chief Judge James L. Foreman on November 29, 1983.

For the reasons fully stated below, the defendant's motion for judgment notwithstanding the verdict is denied, but the motion for a new trial is granted.

— — — — — —

This action was originally filed by Cynthia A. Forrester against various defendants who were alleged to have violated the plaintiff's right to be free from discrimination in employment on the basis of sex. The plaintiff was employed to do juvenile intake and probation work in the Circuit Court of Jersey County and for a period was the supervisor of the unit.

In the Complaint, the plaintiff claimed that she was discriminated against on the basis of her sex in three areas: the setting of her salary; her demotion from supervisor of the unit to intake worker; the termination of her employment. The plaintiff has abandoned the first of these three claims. The plaintiff sought both monetary relief and reinstatement to her prior position.

The plaintiff brought the action pursuant to Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e *et seq.*), as well as pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. The jurisdiction of this court was not disputed.

The Title VII action against defendants White, the Seventh Judicial Circuit and Jersey County were tried simultaneously with the Section 1983 action against Judge White alone. The Section 1983 case was tried by a jury, the Title VII case was non-jury. A jury verdict was rendered on January 6, 1984, in favor of the plaintiff and against defendant White on the issue of liability in the Section 1983 action. A verdict was then rendered on January 9, 1984, assessing damages against White in the total amount of $81,818.80. The Court entered a judgment on the verdict on January 10, 1984.

Subsequently, all parties filed a stipulation for dismissal of the Title VII case, and on February 7, 1984, this Court entered an Order of Dismissal stating that the plaintiff's Title VII claim against Jersey County, Illinois, the Seventh Judicial Circuit, and Judge Howard Lee White are dismissed with prejudice.

Therefore, as the plaintiff notes in her Memorandum filed with this Court on January 30, 1984, "Judge Howard Lee White is the sole remaining defendant in the lawsuit. The claim against him is pursuant to 42 U.S.C. § 1983."

We turn now to the pending motion. As noted above, this is defendant White's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

The plaintiff was hired as Juvenile Probation Officer and Director of Court Services for the Jersey County Circuit Court on April 4, 1977. On July 1, 1979, plaintiff became Project Supervisor for the Jersey County Juvenile Court Intake and Referral Services Project. Judge Howard Lee White, as Project Director, hired plaintiff and supervised her work. This Project was operated pursuant to a grant made to Jersey County by the Illinois Law Enforcement Commission. The County was the grantee under the Project and it controlled the expenditure of the funds.

Defendant Howard Lee White at all times material herein was and is a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois, serving as Presiding Judge of Jersey County, Illinois. The Chief Judge of the Seventh Judicial Circuit or his designee has the authority under Illinois law to hire and fire Juvenile Court Probation Officers pursuant to Ill. Rev. Stat. 1981, ch. 37 § 706-5. Defendant White at all material times herein acted as the designee of the Chief Judge of the Seventh Circuit for purposes of the hiring and firing of Juvenile Court Probation Officers in Jersey County, Illinois.

Joseph Jurkainin was hired by defendant White as the Intake Worker for the Project and began his employment on July 1, 1979. The facts disclose that White consulted with the plaintiff before the hiring of Jurkainin.

After approximately six months on the job together, the plaintiff and Jurkainin experienced a number of conflicts. This involved office rules and procedures, but basically seemed to be a personality clash. This resulted in the plaintiff making a continuous stream of complaints to the defendant about Jurkainan.

Testimony established that White made an independent investigation of the complaints from plaintiff by talking to other courthouse personnel who worked with the plaintiff and Jurkainin. In January, 1980, the plaintiff complained to the

defendant about Jurkainin. Defendant White told the plaintiff she could fire Jurkainin herself. The plaintiff admitted this fact, but chose not to fire Jurkainin. This offer by the defendant was one fact among many at trial which constituted significant evidence that it was not sex discrimination which caused the defendant to later fire the plaintiff. Rather, it is clear that, among other things, the defendant had simply become exasperated over the plaintiff's inability to effectively manage her subordinate, Mr. Jurkainin. There was simply no evidence of an 'good ol' boy system" or anything of the sort between White and Jurkainin — as evidenced by the fact that at one point the defendant told the plaintiff to simply fire Jurkainin if she couldn't deal with him. The plaintiff testified that her reason for not doing so was based upon her concern that it would be a blemish on her record as a supervisor.

Despite this, after January, 1980, the plaintiff continued to complain to defendant White that Jurkainin was not doing his job. By this time White was naturally concerned that the fault might lie with tne plaintiff, and not with Jurkainin. Thus, White did not act upon plaintiff's further requests that Jurkainin be terminated.

By July of 1980, White was clearly upset about the plaintiff's failure to resolve her problems with Jurkainin and stated that he was "tired of babysitting" for the Juvenile Probation Office. Thus, defendant White requested that both the plaintiff and Jurkainin submit their resignation to him directly unless they were able to resolve their problems. Both plaintiff and Jurkainin advised defendant White that they would carry on in a professional manner in the future.

Defendant White then requested that the plaintiff submit to him other alternatives as to how to handle the problems in the Juvenile Probation Office. Plaintiff submitted in writing two (2) suggestions to defendant White for resolving the problems in the Juvenile Probation Office:

(1) Fire Jurkainin, or

(2) Split the office in two.

After the submission of the two (2) suggestions, defendant White asked the plaintiff to think about some more suggestions and submit them to him. Plaintiff failed to submit any further suggestions to the defendant. Defendant White chose to split the office in two rather than fire Jurkainin. White advised the plaintiff that she would no longer be responsible for supervising Jurkainin; however, the plaintiff was not relieved of her duties as Project Supervisor.

Jurkainin continued to submit his work for approval of the plaintiff for a period of time until he realized she returned it directly to him as soon as it was submitted.

It should be noted that the plaintiff's salary was not reduced in any manner or form in July of 1980. Plaintiff's title under the grant never changed.

The Plaintiff failed to prepare the monthly reports as required pursuant to the Illinois Law Enforcement Commission grant after July, 1980. When questioned by the defendant as to the preparation of the reports, plaintiff advised defendant that she would not do the reports as he had relieved her of her supervisory duties. Clearly, the plaintiff knew that defendant White was not pleased with her failure to comply with the grant requirement for monthly reports. Plaintiff advised defendant White that she would teach a secretary how to do the monthly reports.

This Court firmly believes that the above-noted sequence of events constitute significant evidence that defendant White had a "non-discriminatory" reason for being dissatisfied with the plaintiff's work performance. Defendant White gave the plaintiff the opportunity to fire Jurkainin. Due to concern over her managerial reputation, the plaintiff chose not to do so. Although defendant White acquiesced in this decision, the

plaintiff clearly must take responsibility for her subsequent failure to bring the situation under control.

Evidence at trial established that White had yet another "non-discriminatory" reason to terminate the plaintiff's employment. In March, 1980, the plaintiff took two (2) weeks vacation from her job. Plaintiff was entitled to two (2) weeks vacation each year. Beginning in August of 1980, the plaintiff began taking off about one day per week compensatory time. The plaintiff had been advised previously by the defendant that the courthouse rules of Jersey County concerning compensatory time did not apply to her. Defendant White had advised the plaintiff on numerous prior occasions that he did not mind if she took a few hours off if she had spent a few hours in overtime the previous day or night; however, the compensatory time was not cumulative. Defendant White allowed plaintiff to take time off to continue her education.

The grant from the Illinois Law Enforcement Commission did not have a specific provision regarding compensatory time, but stated merely that:

> [c]onsideration and flexibility of hours will depend on the number of "on call" hours actually worked. The intake worker will be on call twenty-four hours a day. However, if he/she requires calls and work on cases during non office hours, compensation will be left to the discretion of the Project Supervisor in accordance with current policy for the local probation office.

During August and September, 1980, plaintiff worked no overtime whatsoever and her caseload declined substantially. Plaintiff never advised defendant White that she planned to take a vacation in the month of October, 1980. The office calendar for the Jersey County Juvenile Probation Office for the month of October, 1980, indicated the following: "Cindy — Comp. day" on October 3, October 6, October 7, October 8, October 9 and October 10, 1980. Plaintiff's personal calendar

for the month of October, 1980, indicated: "Cindy — Comp. day" on October 3, October 6, October 7, October 8, October 9 and October 10, 1980. On September 30, 1980, defendant White saw the notations on the Jersey County Juvenile Probation Office calendar and advised Jurkainin and plaintiff to see him the next day in his chambers.

Defendant White at this time requested that the plaintiff explain to him her understanding of comp time. Plaintiff advised defendant White that "it was in the grant." Defendant White asked plaintiff to get the grant. Plaintiff replied that Jurkainin should get the grant. Defendant White produced a copy of the grant himself. Defendant White asked plaintiff how she planned to take six (6) days of comp time in October, 1980. Plaintiff told defendant White that she was entitled to approximately 477 hours of retroactive comp time, calculating her overtime hours worked since July 1, 1979. Defendant White advised plaintiff she did not have comp time as such. Defendant White advised plaintiff that if she insisted on taking the six days in October, 1980, as comp time off he would terminate her employment. The plaintiff advised defendant White that she intended to take the six comp days off in October, 1980. This clearly amounted to insubordination. Defendant White told plaintiff she was terminated. Plaintiff told defendant White "[y]ou can't fire me." Defendant White advised plaintiff she was fired and told Jurkainin to go with her to the Juvenile Probation Office so she could collect her personal belongings.

Based on these facts, were the Title VII count still before this Court, we would find that the plaintiff has clearly failed to sustain her burden of proof in proving that her demotion and termination were motivated by a discriminatory intent on the part of defendant White, or that sex was a factor in the decision to demote and terminate her.

The plaintiff points to some evidence before the jury which plaintiff believes could have justified an inference of sex discrimination. Although this Court is not convinced, we have

decided to deny the defendant's motion for judgment notwithstanding the verdict, and rather grant the defendant's motion for a new trial. We believe that in so doing we are giving the plaintiff the benefit of the doubt:

> [a] judge may set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence that is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice.

Atlantic and Pacific Stores, Inc. v. Pitts, 283 F.2d 756 (4th Cir. 1960).

A motion for judgment notwithstanding the verdict "can be granted only if the motion for directed verdict should have been granted." *Walker v. KFC Corp.,* 515 F. Supp. 612, 615 (S.D. Cal. 1981). Defendant did not entirely convince this Court that a directed verdict should have been granted; therefore, the motion for judgment notwithstanding the verdict will be denied.

This Court has greater latitude in considering defendant's alternative motion for a new trial: "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so." 11 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2803 (1973). A new trial may be ordered for a great variety of reasons:

> [i]t has been said that the general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

Id. § 2805. *See also Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972) (court may order new trial if first trial resulted in a miscarriage of justice), *cert. denied*, 410 U.S. 930 (1973). "[W]here the trial court finds the verdict contrary to the weight of the evidence and grants a new trial...the appellate court should 'exercise a closer degree of scrutiny and supervision...in order to protect the litigants' right to jury trial.' " *Id.*, 466 F.2d at 187 [quoting *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d. Cir.), *cert. denied*, 364 U.S. 835 (1960)]. On the other hand:

> [W]hen evidence is erroneously admitted or excluded or where the trial court has erred in the instructions to the jury, the trial court is considered in a better position to correct a manifest injustice in ruling on the motion for new trial. Under these circumstances the grant of the new trial does not interfere with the role of the jury as the trier of fact.

Fireman's Fund, 466 F.2d at 186. The trial court is also in the best position to determine whether the verdict is excessive; one Court of Appeals has noted that

> inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is a "plain injustice" or a "monstrous" or "shocking" result.

Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 410 (8th Cir. 1976) (quoting *Solomon Dehydrating Co. v. Guyton*, 294 F.2d

439, 447-48 (8th Cir.), *cert. denied,* 368 U.S. 929 (1961). The Seventh Circuit agrees that the judge has discretion to set aside a verdict as excessive. *Collum v. Butler,* 288 F. Supp. 918 (N.D. Ill. 1968), *aff'd* 421 F.2d 1257 (7th Cir. 1970).

In addition to granting a new trial because the verdict was against the weight of the evidence, we stress that the damages were, in fact, excessive, and also that in a new trial more appropriate instructions will be provided on the Fourteenth Amendment issue.

Concerning the excessive damages, it is the opinion of this Court that the $35,000.00 assessed by the jury for humiliation for discharge was simply unreasonable. There was only limited evidence of alleged humiliation. We note that the plaintiff had sufficient self confidence to run for Sheriff of Jersey County against the incumbent Sheriff a short time thereafter.

There is other evidence that the jury was tainted by prejudice or emotion. Absolutely no evidence was presented to the jury on expenses related to search for employment. Plaintiff's counsel did not even argue for the award after she failed to present even one word of evidence from the plaintiff on these alleged expenses. Considering this, the jury award of $750.00 was simply unreasonable.

Finally, the Court failed to instruct the jury properly on the Equal Protection Claim. Neither party requested a specific instruction in this regard. This was understandable, since the plaintiff's claim under 42 U.S.C. § 1983 was based primarily on the Title VII claim. This Court has now determined, however, that defendant White cannot be sued directly under Title VII. White is not an "employer" under Title VII, according to the requirements stated in 42 U.S.C. § 2000e(b). Thus, we would dismiss a Title VII claim for want of jurisdiction. *Burke v. Friedman,* 556 F.2d 867 (7th Cir. 1977).

Since Judge White cannot be sued directly under Title VII, he cannot then be sued under 42 U.S.C. § 1983 which is based

upon a violation of Title VII. *Huebschen v. Department of Health and Social Service,* 716 F.2d 1167 (7th Cir. 1983). Of course the plaintiff can still use her initially plead Equal Protection Claim under the Fourteenth Amendment as the basis for the Section 1983 action. In order to do so, however, the plaintiff must prove that defendant White is responsible for purposeful and "intentional" acts of discrimination. *Washington v. Davis,* 426 U.S. 229 (1976). A definitional "intent" instruction was given to the jury but was never tied to the issues instruction. The issues instructions as submitted to the jury in the instant case recite the necessary elements to prove a Title VII claim, not an Equal Protection Claim. Nowhere in the instructions does it state that the defendant must commit purposeful, intentional acts of discrimination. Thus, the instructions are simply inadequate to support an Equal Protection Claim. A jury must be properly instructed on the applicable legal standard before it can fairly perform its function. *Tyler v. Dowell, Inc.,* 274 F.2d 890 (10th Cir. 1960), *cert. denied,* 363 U.S. 812.

For all of the above-noted reasons, taken together, this Court is convinced that the defendant's motion for a new trial must be granted.

THEREFORE, IT IS THE ORDER of this court that defendant's Motion for Judgment Notwithstanding the Verdict is DENIED and that defendant's Motion for a New Trial is GRANTED.

Dated this 16th day of March, 1984.

/s/ Gerald B. Cohn
United States Magistrate

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 82-3231

CYNTHIA A. FORRESTER,
Plaintiff,

vs.

HOWARD LEE WHITE,
Defendant.

ORDER

Before the court is the defendant's Motion for Summary Judgment, filed on March 30, 1984. The plaintiff filed a Memorandum in Opposition to said motion on April 11, 1984. A Motion Hearing was held before this Court, at which both parties advanced oral argument.

For the reasons stated below, the defendant's Motion for Summary Judgment is granted.

— — — — — — —

On March 16, 1984, this Court granted the defendant's motion for a new trial. As we noted in that Order, plaintiff's Title VII claims against Jersey County, the Seventh Judicial Circuit and Judge Howard Lee White were all dismissed with prejudice on February 7, 1984, pursuant to a Stipulation for Dismissal. Therefore, the plaintiff is left with a claim alleging a violation of the equal protection clause of the Fourteenth Amendment brought pursuant to 42 U.S.C. § 1983. Our Order of March 16, 1984, reviewed the facts and history of this case in some detail. We will not repeat these facts here, but rather will refer to them only to the extent necessary to clarify our resolution of the rather straightforward and narrowly defined single issue now presented by the defendant's Motion for Summary Judgment.

The defendant asserts that the plaintiff's instant suit, now brought pursuant to 42 U.S.C. § 1983, is barred because of the doctrine of judicial immunity. The defendant cites as primary authority the case of *Blackwell v. Cook*, 570 F. Supp. 474 (N.D. Ind. 1983). At the recent Motion Hearing the plaintiff conceded that were we to adopt the reasoning of *Blackwell*, we would be constrained to enter summary judgment against the plaintiff. The plaintiff admits that the facts are virtually identical. However, the plaintiff urges this Court not to adopt the reasoning of *Blackwell*.

As we note in some detail below, we have decided to grant the defendant's Motion for Summary Judgment for two reasons. First, our careful review of *Blackwell* indicates that the case was correctly decided by Chief Judge Sharp of the United States District Court for the Northern District of Indiana. Second, there is no basis for distinguishing between the relevant facts of the two cases.

As we noted in our Order of March 16, 1984, the plaintiff Cynthia A. Forrester, alleges that the defendant violated her right to be free from discrimination in employment on the basis of sex. The plaintiff was employed to do probation work in the Circuit Court of Jersey County, Illinois. Judge Howard Lee White hired her. Defendant White later fired her. Defendant White now seeks absolute judicial immunity from monetary damages for his actions, based upon the decision in *Blackwell*.

A review of the law preceding the *Blackwell* decision seems appropriate at this point.

Although not immunizing him from injunctive and declaratory relief, the Civil Rights Act did leave intact a state court judge's absolute immunity from monetary damages for the performance of a judicial act. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The test to determine whether the doctrine of judicial immunity protects a judge from damages for a particular act is twofold; the leading case on this point states it as follows:

> . . . [T]he factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. *Stump v. Sparkman,* 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978).

The *Blackwell* decision analyzed this two-part test in some detail, and the analysis appears to be a proper one. We adopt its reasoning.

The "nature of the act" half of the *Sparkman* test is not dependent of whether the complained of act took place outside the courtroom. Relying on *Sparkman,* the Seventh Circuit rejected a "place of the act" test saying,

> [T]hat a judge has no jurisdiction outside a courtroom is without merit. Valid judicial acts are often performed outside the courtroom. *Lopez v. Vanderwater,* 620 F.2d 1229, 1234 (7th Cir.), *cert. denied,* 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980).

The *Lopez* opinion noted that essential judicial acts relating to decision-making would otherwise not be protected by the doctrine of judicial immunity if a "place-of-the-act" or "out-side-the-courtroom" test were to be adopted.

We turn next to the second part of the test. As *Blackwell* noted,

> [S]upervisory duties of the judge over persons involved in the judicial process do not defeat the other half of the *Sparkman* test, i.e., "did the person deal with the judge in his judicial capacity?" This is not a situation where the plaintiff was involved in an automobile collision with the defendant and the defendant is seeking to assert judicial immunity. Nor is it a situation where the judge is acting

> solely as an employer, e.g., hiring and firing a personal valet....

Blackwell v. Cook, 570 F. Supp. 474, 479 (N.D. Ind. 1983).

As *Blackwell* went on to note, the critical point here is the confidential relationship that exists between a probation officer and a judge. The nature of the judge-probation officer relationship makes it essential to the decision-making process.

In the case at bar, the defendant is the Circuit Judge of Jersey County, Illinois. Ill. Rev. Stat. 1983, Ch. 37, ¶ 706-5 states that probation personnel serve at the pleasure of the chief judge or his designee. The defendant hired plaintiff to be a juvenile officer for Jersey County and the plaintiff's duties were to investigate complaints against juveniles, make recommendations to the state's attorney, prepare presentence reports, etc. The plaintiff was hired and supervised by the defendant and no one else exercised authority or control over her. The plaintiff was a member of the defendant's personal staff.

Ill. Rev. Stat. 1983, ch. 37, ¶ 706-1 lists the functions and duties of juvenile probation departments which include the following:

1. Investigate and evaluate complaints indicating delinquency;

2. Assist and determine whether a complaint under the Juvenile Court Act will be filed with the state's attorney;

3. Conduct pre-hearing investigations and formulate recommendations to the court;

4. To counsel juveniles;

5. To supervise minors referred by the court;

6. Act as liasion officer between the court and agencies to which juveniles are referred;

7. To serve as guardian of a ward of the court;

8. Provide probation supervision as ordered by the court;

9. To arrange placements pursuant to court orders;

10. To assume administrative responsibilities for such detention or other institutions for juveniles as the court may operate;

11. To maintain adequate records and to make reports to the court;

12. To perform such other services necessary to implement the law or as directed by the court.

The similarities between *Blackwell* and the case at bar are significant. Both cases involve probation personnel with at least substantially similar duties as prescribed by state law and actual work experience. In both states these probation personnel work at the pleasure of the judge who also supervises them and possesses the authority to hire and fire them. In both instances, the probation personnel enjoy a very confidential relationship with the judge and play a very large and important role in the judicial process.

In conclusion, we believe that the *Blackwell* case was correctly decided. We have examined the case cited by *Blackwell,* and have compared the facts of the instant case to those in *Blackwell.* In the end, however, much rests on a sound public policy determination: should absolute judicial immunity for monetary damages be extended to the facts of this case? Precedents drawn from closely related circumstances suggest that it should be.

For example, the United States Court of Appeals for the Fifth Circuit has not confined the grant of absolute judicial immunity to the narrow situation of the judge deciding a given case. Rather, the Fifth Circuit refers to the "judicial phase of the

criminal process." Discussing the immunity of probation officers, the court noted

> Judges who act within the scope of their authority enjoy absolute immunity from damage suits. (citations omitted) ... We hold that a probation officer is entitled to the same protection when preparing and submitting a presentence report in a criminal case. The report is an integral part of the sentencing process, and in preparing the report the probation officer acts at the direction of the court. *See* Fed. R. Crim. P. 32. We think it apparent that this narrow function is "intimately associated with the judicial phase of the criminal process" ... (citations omitted).

Spaulding v. Nielson, 599 F.2d 728, 729 (5th Cir. 1979).

Similarly, the defendant should properly be provided with absolute immunity from damages in the instant case. As noted in *Blackwell*,

> [t]he nature of the judge-probation officer relationship ... shows that it is essential to the decision making process. Although there is a supervisory aspect to this relationship, it does not in any way minimize the judicial character of the roles both individuals perform...[The probation officer] has dealt with the Circuit Court in its capacity as a judge and has aided it in the performance of judicial acts. As a result, her prayer for damages growing out of those acts and relationships has no support in light of the doctrine of judicial immunity under 42 U.S.C. 1983."

Blackwell v. Cook, 570 F. Supp. 474, 478-79 (N.D. Ind. 1983).

Therefore, for the reasons stated above, the defendant's Motion for Summary Judgment is GRANTED.

Dated this 13th day of April, 1984.

/s/ Gerald B. Cohn
United States Magistrate

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 11, 1986

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. WILLIAM H. TIMBERS, Senior Circuit Judge*

No. 84-1823

CYNTHIA A. FORRESTER,
Plaintiff-Appellant,

vs.

JUDGE HOWARD LEE WHITE,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, E. St. Louis Division.

No. 82 C 3231

GERALD D. COHN, Magistrate

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-captioned cause by counsel for the plaintiff-

---

* The Honorable William H. Timbers, Senior Circuit Judge for the Second Circuit, sitting by designation.

appellant, which petition we consider as a petition for rehearing and a suggestion for rehearing *en banc:* A majority of the judges on the original panel have voted to deny the petition, and a majority of the active judges have voted to deny the suggestion for rehearing *en banc*.** The petition is therefore DENIED.

** Judges Richard D. Cudahy, Richard A. Posner, and Frank H. Easterbrook voted to grant a rehearing *en banc*.

(2)

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Respondent

IMELDA R. TERRAZINO •
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570
Of Counsel

• Counsel of Record

Printed by Authority of the State of Illinois (P.O. 33537—50—2-3-87)

18pp

QUESTION PRESENTED

Whether the doctrine of judicial immunity shields a state-court judge from liability for damages in a § 1983 action for alleged sex-based discrimination arising from the dismissal of a probation officer.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING THE WRIT:	
I.	
There Is No Reason To Grant Review On Petitioner's Contention That This Court's Decisions Require A "Functional" Approach To Immunity Law Where The Seventh Circuit Did Employ A Functional Approach To Immunity Law In This Case	3
II.	
The Seventh Circuit's Factual Conclusion In This Case Does Not Warrant Further Review	6
III.	
There Is No Reason To Grant Review On Petitioner's Contention That There Is A Conflict In Legislative Immunity Law Where The Present Case Involves Only Judicial Immunity Law	7
IV.	
There Is No Reason To Grant Review On Petitioner's Contention That A Conflict Exists In Judicial Immunity Law Where The Courts Have Simply Reached Different Factual Conclusions In Cases Involving Different Court Employees In Different Court Systems	9
CONCLUSION	13

TABLE OF AUTHORITIES

	PAGE
Agromayor v. Colberg, 738 F.2d 55 (1st Cir.), *cert. denied*, 105 S.Ct. 515 (1984)	8
Blackwell v. Cook, 570 F.Supp. 474 (N.D.Ind. 1983)	12
Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)	3, 5
Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 107 S.Ct. 601 (1986)	8
Butz v. Economou, 438 U.S. 478 (1978)	3, 6
Clark v. Campbell, 514 F.Supp. 1300 (W.D.Ark. 1981)	12
Cronovich v. Dunn, 573 F.Supp. 1330 (E.D.Mich. 1983)	12
Davis v. Passman, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (5th Cir. 1978), *rev'd*, 442 U.S. 228 (1979)	7, 9
Doe v. McMillan, 412 U.S. 306 (1973)	8
Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir.), *cert. denied*, 105 S.Ct. 112 (1984)	9, 10, 11
Laskowski v. Mears, 600 F.Supp. 1568 (N.D.Ind. 1985)	7
Lewis v. Blackburn, 555 F.Supp. 713 (W.D.N.C. 1983)	11
Pierson v. Ray, 386 U.S. 547 (1967)	3
Pruitt v. Kimbrough, 536 F.Supp. 764 (N.D.Ind. 1982), *aff'd mem.*, 705 F.2d 462 (7th Cir. 1983)	12

Pulliam v. Allen, 466 U.S. 522 (1984) 5

Shore v. Howard, 414 F.Supp. 379 (N.D.Tex. 1976) . 7, 12

Stump v. Sparkman, 435 U.S. 349 (1978) 3, 4, 12

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 3

Tenney v. Brandhove, 341 U.S. 367 (1951) 8

United States v. Brewster, 408 U.S. 501 (1972) .. 9

No. 86-761

IN THE

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CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

Petitioner Cynthia Forrester initiated this action under 42 U.S.C. § 1983, alleging that respondent Judge Howard Lee White, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court in Jersey County, Illinois, demoted and discharged her because of her sex in violation of § 1983 and the Fourteenth Amendment.

The § 1983 claim was tried to a jury, which returned a verdict for Ms. Forrester and awarded approximately $82,000 in compensatory damages. The district court denied Judge White's motion for judgment notwithstanding the verdict, but granted his motion for a new trial.

Judge White then filed a motion for summary judgment arguing that he was entitled to absolute immunity from a civil damage award. The district court granted the motion and judgment was entered in favor of Judge White.

The Seventh Circuit affirmed the district court's finding of immunity.[1] The Seventh Circuit denied Ms. Forrester's Petition for Rehearing and Suggestion for Rehearing En Banc, with three judges voting to grant a rehearing *en banc*.

Judge White adopts, as his Statement of the Case, the statement in the opinion of the Seventh Circuit, which appears at A-2 through A-6 of Ms. Forrester's petition.

---

[1] Although Ms. Forrester initially sought both equitable and monetary relief, only her claim for damages remained on appeal.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON TO GRANT REVIEW ON PETITIONER'S CONTENTION THAT THIS COURT'S DECISIONS REQUIRE A "FUNCTIONAL" APPROACH TO IMMUNITY LAW WHERE THE SEVENTH CIRCUIT DID EMPLOY A FUNCTIONAL APPROACH TO IMMUNITY LAW IN THIS CASE.

The Seventh Circuit employed a functional approach in holding the respondent judge absolutely immune from civil damage liability in this case. Initially, the Seventh Circuit identified the essential need underlying the common law doctrine of judicial immunity to safeguard principled and independent judicial decision-making and to give judges the freedom to act upon their convictions without fear of personal consequences so as to promote the effective administration of our legal system. See *Stump v. Sparkman*, 435 U.S. 349 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). It is essentially the concern for principled and fearless decision-making that forms the basis for judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

The Seventh Circuit recognized that whether immunity attaches depends upon the nature of the act (that is, the relation it has to the process of adjudication), not the identity of the actor. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978). The decision below was not grounded on the mere fact that petitioner was dismissed by a judge; that the act of firing petitioner was an act normally performed by a judge in Illinois; that the petitioner assisted the judge in the accomplishment of judicial acts; or even on the existence

of a close and confidential working relationship between the petitioner probation officer and the judge. The Seventh Circuit necessarily considered this relationship. But the Court's holding was directly based on the Court's conclusion that the judge's act of firing petitioner did in fact implicate and affect the judge's ability to act in a principled and independent manner in the judicial decision-making process.

In reaching this conclusion, the Seventh Circuit recognized that judicial immunity does not apply to all acts performed by a judge, but only to "judicial" acts. To determine whether an act is judicial, the following factors must be considered: 1) whether the act is one normally performed by a judge; and 2) the expectations of the parties, that is, whether the parties dealt with the judge in his official capacity as judge. *Stump v. Sparkman*, 435 U.S. at 362.

The first part of this test was clearly met where, under Illinois law, only a judge could order petitioner's dismissal. The Seventh Circuit also found that the second part of the test was met by examining the specific duties of the petitioner in her capacity as a probation officer under Illinois law and the inter-relationship of these duties to the judge's decision-making ability. While petitioner's relationship with the judge was certainly an employer-employee relationship, under Illinois law both the relationship and the act of hiring, supervising and discharging probation officers are intimately connected with the judicial decision-making process.

Petitioner did in fact deal with the judge in his judicial capacity by directly assisting in the decision-making process itself. She assisted in the decision-making process by providing the judge with crucial advice and information

on presentencing and sentencing, as well as on the granting, denial or revocation of probation. These matters indisputably constitute judicial acts, and petitioner's advice and information were intimately and inextricably related to the judicial decision-making of the court itself.

The Seventh Circuit found this to be a fundamental consideration in deciding whether the respondent was acting in a judicial capacity in dismissing petitioner. Because the petitioner provided the judge with information and advice regarding the substance of the litigation before the court, discord between the petitioner and the judge would affect the judge's ability to act in a principled and independent manner in his role as a judge, thereby implicating the judge's institutional role within the court system.

The Seventh Circuit further recognized the principle that the immunity doctrine is for the public and not corrupt judges. *Pulliam v. Allen*, 466 U.S. 522, 532 (1984); *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 350. This concern for the public in good part motivated the granting of immunity in this case. The Seventh Circuit reasoned that the quality of a judge's decision-making will decline when he loses confidence in his probation officer but hesitates to fire him/her because of the threat of litigation. Where this occurs, the parties appearing before the court are the real victims.

Other policy reasons identified in *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 347-354 support the Seventh Circuit's granting of immunity in this case. The Seventh Circuit reasoned, for example, that a judge who loses confidence in his probation officer, but who faces the prospect of defending against and perhaps satisfying money damages, will be driven to wasteful self-protective devices. The Seventh Circuit considered alternative safeguards such as im-

peachment, censure, equitable and declaratory relief which reduce the need for private money actions against judges; also that the ease of alleging bad faith would make a qualified good faith immunity virtually useless. Finally, the judge may be exposed to charges of impropriety by litigants who discover that his professional relationship with his probation officer has declined. All of these factors are still important today. See *Butz v. Economou*, 438 U.S. 478, 509-510 (1978).

In summary, the Seventh Circuit employed a functional approach to immunity law, as required by this Court's decisions. The Seventh Circuit likewise paid proper heed to the purposes and principles underlying the doctrine of judicial immunity. The decision below does not create new law. It simply clarifies and reinforces the longstanding principle established by this Court that a judge's acts which affect his independent decision-making are shielded by judicial immunity. Conversely, a judge will not be immune where his acts do not implicate the decision-making process. Under these unexceptional circumstances, this Court should deny the petition for writ of certiorari.

II.

THE SEVENTH CIRCUIT'S FACTUAL CONCLUSION IN THIS CASE DOES NOT WARRANT FURTHER REVIEW.

Petitioner asks this Court to articulate a "clear and unambiguous general rule" which will govern all immunity law. As did the Seventh Circuit, however, the courts which have addressed immunity law have repeatedly recognized that there can be no general rule or bright line test which determines whether immunity applies in a particular case. Rather, it is a question of fact whether the relationship between a given court employee and a particular judge creates a need for immunity to preserve indepen-

dent administration of the law. (See Opinion, Petitioner's Appendix, A-20); *Laskowski v. Mears*, 600 F.Supp. 1568, 1574 (N.D.Ind. 1985); *Shore v. Howard*, 414 F.Supp. 379, 386 n. 3 (N.D.Tex. 1976).

In holding that the respondent judge was entitled to judicial immunity, the Seventh Circuit carefully confined its decision to the factual situation in this case. The Court expressly emphasized that the decision affects only this particular petitioner's claim for money damages in connection with her dismissal as a probation officer in the Illinois court system; the decision does not control other decisions relating to the respondent judge's staff or even other decisions regarding probation officers in a different court system. (See Opinion, Petitioner's Appendix, A-20, A-22).

In essence, petitioner is simply asking this Court to reach a different conclusion of fact than that reached by the District Court and the Seventh Circuit in this case. The Seventh Circuit's narrowly limited factual conclusion does not warrant further review by this Court.

III.

THERE IS NO REASON TO GRANT REVIEW ON PETITIONER'S CONTENTION THAT THERE IS A CONFLICT IN LEGISLATIVE IMMUNITY LAW WHERE THE PRESENT CASE INVOLVES ONLY JUDICIAL IMMUNITY LAW.

Petitioner's claimed conflict in immunity law rests substantially on *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (5th Cir. 1978), *rev'd* 422 U.S. 228 (1979). In *Passman*, a congressman fired his deputy administrative assistant because she was a woman. The original panel held in *Passman* that the firing of congressional employees was not within the legitimate scope of legislative activity, so that the con-

gressman was not immune under the Constitution's Speech or Debate Clause to the assistant's Fifth Amendment claim.

Petitioner asserts that review by this Court is required in the present case because the Fifth Circuit's decision in *Passman* directly conflicts with the recent decision in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 107 S.Ct. 601 (1986). In *Browning*, the D.C. Circuit held that the dismissal of an official reporter of the House of Representatives was shielded by legislative immunity where the employee's duties were directly related to legislative investigation. The D.C. Circuit reasoned that if an employee's duties are an integral part of the legislative process, such that they are directly assisting congressional members in the discharge of their functions, "personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny." 789 F.2d at 929. Accord: *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 105 S.Ct. 515 (1984).

Petitioner's reliance on a purported conflict in legislative immunity law is inappropriate in the present case which involves only judicial immunity law. As the decision below noted, judicial immunity differs from the immunity afforded members of Congress. (See Opinion, Petitioner's Appendix, A-8 fn 7; *Doe v. McMillan*, 412 U.S. 306 (1973); *Tenney v. Brandhove*, 341 U.S. 367 (1951)). The latter is guaranteed by the Constitutional Speech or Debate Clause, whereas judicial immunity is a common law doctrine. Legislative immunity is essentially based on the need for an independent legislative branch, free from the coercion or restraint imposed by inquiry from other governmental authority. See *Tenney v. Brandhove*, 341 U.S. at 373-378. The Speech or Debate Clause is intended to protect the

integrity of the legislative process by restraining the judiciary and the executive from questioning legislative actions. *United States v. Brewster*, 408 U.S. 501, 507 (1972).

Because legislative immunity and judicial immunity involve different considerations, resolution of a purported conflict in legislative immunity should await a proper case.[2]

IV.

THERE IS NO REASON TO GRANT REVIEW ON PETITIONER'S CONTENTION THAT A CONFLICT EXISTS IN JUDICIAL IMMUNITY LAW WHERE THE COURTS HAVE SIMPLY REACHED DIFFERENT FACTUAL CONCLUSIONS IN CASES INVOLVING DIFFERENT COURT EMPLOYEES IN DIFFERENT COURT SYSTEMS.

Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir.), *cert. denied*, 105 S.Ct. 112 (1984), is the only court of appeals decision cited by petitioner to support her claim of a "direct conflict" in judicial immunity law. No such conflict exists as a result of the decision below which involves different circumstances and, therefore, different considerations.

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[2] There is substantial doubt that any real conflict exists at all in legislative immunity law. In *Passman*, the Fifth Circuit *en banc* reversed the panel's decision without resolving the issue of legislative immunity. 571 F.2d 793 (5th Cir. 1978). This Court reversed the *en banc* decision, concluding that the plaintiff was asserting a constitutionally protected right, that the complaint stated a cause of action, and that damages were the appropriate remedy. 428 U.S. 228 (1979). The Court emphasized that it expressed no opinion on the possible immunity defenses of the defendant. See 442 U.S. at 236 n. 11, 246 n. 25. Three dissenting justices suggested in *Passman* that the issue of legislative immunity should have barred the plaintiff's action. See 442 U.S. at 249-251. The Court subsequently refused to review the scope of legislative immunity in both *Agromayor* and *Browning*, both of which reached conclusions contrary to the Fifth Circuit's decision in *Passman*.

In *Goodwin*, the plaintiff brought a Title VII action against the Circuit Court of St. Louis County, Missouri, and a § 1983 action against a circuit court judge, alleging that she was removed from her position as a hearing officer on the basis of sex. Unlike the Seventh Circuit in this case, the Eighth Circuit scarcely addressed judicial immunity in *Goodwin*.[3] In upholding a damage judgment against the defendant judge, the Eighth Circuit instead analyzed in detail, and rejected, the judge's claim of "good faith" or qualified immunity from damages. 729 F.2d at 545-546.

The Eighth Circuit similarly rejected the circuit court's contentions in *Goodwin* that the plaintiff could not sue under Title VII because she was an immediate advisor to an elected official and that the circuit court was cloaked with judicial immunity. In doing so, the Eighth Circuit analyzed the hearing officer's duties as they related to the judge. The Court noted the district court's holding that the plaintiff was not hired as a hearing officer to be on the personal staff of the defendant judge or any other judge, but was hired as a county employee. 729 F.2d at 549 fn 10. The Eighth Circuit likewise held that the plaintiff was not an immediate advisor to the judge where the testimony clearly showed she had few personal contacts with the judge. The hearing officer job itself required the plaintiff to assert her independent judgment free from any direction from others, including the judge, and the advice she offered the judge was of a formal, detached nature from one judicial officer to another. 729 F.2d at 548.

The Eighth Circuit concluded in these circumstances that the circuit court was not entitled to judicial immunity

[3] The dissenting opinion below noted, in fact, that the judge's absolute immunity from damage liability for employment discrimination was not even argued in *Goodwin*. (See Opinion, Petitioner's Appendix, A-30)

because "[t]he decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision." 729 F.2d at 549. The Eighth Circuit also summarily stated in a footnote that "[f]or the same reasons we also reject Judge Corrigan's claim to judicial immunity from suit under § 1983." 729 F.2d at 549 n. 12. This brief reference to judicial immunity was based upon the factual situation before the Court where the relationship between the judge and the hearing officer was plainly too distant to implicate the substance of the judge's decisions. Under the circumstances presented in *Goodwin* the Eighth Circuit simply had no occasion, as did the Seventh Circuit in this case, to consider the purposes and principles underlying the judicial immunity doctrine in the context of other judicial personnel decisions.

The Eighth Circuit's conclusion in *Goodwin* is entirely compatible with the decision below where it was found that petitioner, in her capacity as a probation officer in the Illinois court system, rendered crucial advice and information which directly implicated the exercise of the respondent judge's discretionary judgment. The Seventh Circuit found that the judge's acts in demoting and dismissing petitioner would affect his ability to act in a principled and independent manner in his role as a judge if he could not take those actions without the defense of judicial immunity. This is the fundamental distinguishing factor between this case and *Goodwin*, as well as other cases cited by petitioner which involve employment decisions regarding various other court personnel.[4]

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[4] For example, in *Lewis v. Blackburn*, 555 F.Supp. 713 (W.D.N.C. 1983), the district court held that a judge was not absolutely immune for failing to reappoint a magistrate; since the power to select magistrates was variously vested by law in governors, bar

(Footnote continued on following page)

[4] *continued*
organizations, judges and other local officials, it was not an act "normally performed by a judge," and thus failed the test in *Stump v. Sparkman, supra.*

In *Clark v. Campbell*, 514 F.Supp. 1300 (W.D.Ark. 1981), the district court held that a county judge who had the statutory power to hire and fire *all* county employees, with minor exceptions, did not perform a judicial act but an administrative function in firing the county director of aging programs. There was no discussion at all in *Clark* regarding any direct relationship between the judge and the director.

In *Cronovich v. Dunn*, 573 F.Supp. 1330 (E.D.Mich. 1983), the district court initially held that the defendant judges were not entitled to absolute judicial immunity for failure to appoint the plaintiff as a friend of the court, again with no discussion of the plaintiff's duties or specific connection with the court. The district court subsequently reconsidered this holding (573 F.Supp. 1340 (1983)), finding that the cases involving judicial immunity were not as crystal clear as the court had thought in light of *Pruitt v. Kimbrough*, 536 F.Supp. 764 (N.D.Ind. 1982), aff'd mem., 705 F.2d 462 (7th Cir. 1983) and *Blackwell v. Cook*, 570 F.Supp. 474 (N.D.Ind. 1983). In *Pruitt* and *Blackwell*, the defendant state judges were held immune from damages for the dismissal of probation officers under a statute very similar to the Illinois statute involved in the present case. The district court did not resolve the judicial immunity issue in *Cronovich* since its denial of the defendant's motion to dismiss on the grounds of absolute immunity appeared to be appealable as of right.

Shore v. Howard, 414 F.Supp. 379 (N.D.Tex. 1976), is the only decision cited by petitioner that involved the dismissal of a probation officer. The district court held in *Shore* that certain judges were necessary defendants only for the purpose of any equitable relief sought by the plaintiffs. Because the judges could not possibly have been liable for monetary damages in *Shore*, the court expressly did not reach the question whether the judges were immune from liability for monetary damages. The court noted, however, that judicial officers are not always liable in damages for dismissal of employees, and that the availability of judicial immunity for suits in damages requires a careful weighing of the circumstances in each case. 414 F.Supp. at 386 n. 3. The court further recognized that acts which affect the judge's independent decision-making are shielded by judicial immunity. 414 F.Supp. at 385. This rationale is consistent with the Seventh Circuit's rationale in the present case.

Because there is no real conflict with the decisions of other circuits in the area of judicial immunity law, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois

100 West Randolph Street, 12th Floor
Chicago, Illinios 60601
(312) 917-3000

Attorneys for Respondent

IMELDA R. TERRAZINO *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Of Counsel

* Counsel of Record

Supreme Court, U.S.
FILED
APR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYNTHIA A. FORRESTER,
Petitioner,

vs.

JUDGE HOWARD LEE WHITE,
Respondent.

BRIEF OF PETITIONER

MARY ANNE SEDEY
(Counsel of Record)
2608 South Kingshighway
St. Louis, Missouri 63139
(314) 773-3566
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Does the doctrine of judicial immunity bar a civil action for damages against a judge for demoting and discharging a court employee on account of her sex?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision and Statute Involved	2
Statement of the Case	3
Summary of Argument	5
Argument	7
I The Decisions Of This Court Adopt A "Functional" Approach Limiting The Scope Of Absolute Official Immunity	7
II The Historic Purpose Of The Doctrine Of Judicial Immunity Is To Assure Independent, Fearless Decision-Making And It Is Justified By The Potential To Correct Judicial Error On Appeal	9
III This Court's Decisions Require That The Doctrine Of Judicial Immunity Be Applied Only When Judges Are Engaged In Adjudicative Functions	12
IV The Seventh Circuit's Decision Expands The Doctrine Of Judicial Immunity Beyond The Limits Created By This Court's Decisions And Beyond The Scope Required To Effectuate Its Purposes	15
Conclusion	20

TABLE OF AUTHORITIES

Page

Cases:

Barr v. Mateo, 360 U.S. 564 (1959) 9

Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) .. 5, 10, 11, 12, 14, 15, 17

Butz v. Economou, 438 U.S. 478 (1978) 5, 9, 11, 14, 17, 19

Cleavinger v. Saxner, 474 U.S. ____, 88 L.Ed.2d 507 (1985) 12, 14

Davis v. Passman, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds,* 571 F.2d 793 (5th Cir.), *rev'd,* 442 U.S. 228 (1979) 16

Eastland v. United States Serviceman'a Fund, 421 U.S. 491 (1975) 7

Ex Parte Virginia, 100 U.S. 339 (1880) 12, 13, 15, 16

Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber 1607) 10

Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir. 1984) . 13, 16

Gravel v. United States, 408 U.S. 606 (1972) 8, 9

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5, 7, 9, 18

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 9

Imbler v. Pachtman, 424 U.S. 409 (1976) 7, 8

Lynch v. Johnson, 420 F.2d 818 (1970) 16

McMillan v. Svetanoff, 793 F.2d 149 (7th Cir. 1986) ... 16

Mitchell v. Forsyth, 474 U.S. ____, 86 L.Ed.2d 411 (1985) 10

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 7

Pulliam v. Allen, 466 U.S. 522 (1984) 5, 9, 11

Stump v. Sparkman, 435 U.S. 349 (1978) . 5, 7, 8, 12, 13, 15, 17

Supreme Court of Virginia v. Consumer's Union of America, 446 U.S. 719 (1980) 5, 6, 8, 13, 14, 16

Tenney v. Brandhove, 341 U.S. 367 (1951) 9

Constitutional Provisions:

U.S. Constitution Amendment XIV 2, 4

Article I, Section 6, cl. 1 of the Constitution, the Speech or Debate Clause 9

Statutes:

42 U.S.C. Section 1983 ..... 2, 4

28 U.S.C. Section 1254(1) 2

Other authorities:

Block, *Stump v. Sparkman and the History of Judicial Immunity,* 1980 Duke L.J. 879 (1980) 10, 13

Feinman & Cohen, *Suing Judges: History and Theory,* 31 S.C.L. Rev. 201 (1980) 10

Jennings, *Tort Liability of Administrative Officers,* 21 Minn. L. Rev. 263 (1937) 10

King, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability,* 20 Ariz. L. Rev. 549 10

Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity,* 64 Va. L. Rev. 833 10

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 792 F.2d 647 (7th Cir. 1986), and is reprinted in the Appendix to the Petition for Certiorari at A-1.

The opinion of the United States District Court for the Southern District of Illinois granting respondent's motion for summary judgment is unreported. It is reprinted in the Appendix to the Petition for Certiorari at A-49. The opinion of the district court denying respondent's motion for judgment notwithstanding the verdict and granting respondent's motion for a new trial is unreported. It is reprinted in the Appendix to the Petition for Certiorari at A-38.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit under review here was entered June 5, 1986. On September 11, 1986, the Court of Appeals denied petitioner's timely petition for rehearing and suggestions for rehearing *en banc*. A petition for writ of certiorari was filed with this Court on November 10, 1986 and granted on February 23, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Con-

gress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Cynthia Forrester was employed by the Jersey County, Illinois, Circuit Court for three and one-half years. She was hired in April, 1977 as Juvenile and Adult Probation Officer for the Court, and held that position until she was appointed Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project in July of 1979.[1] In the summer of 1980, Ms. Forrester was demoted to a non-supervisory position and on October 1, 1980, she was discharged.

Respondent Judge Howard Lee White, was, at all times material to this dispute, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court of Jersey County. Pursuant to Illinois law, Judge White was authorized to hire and discharge juvenile court probation officers. He was also the designated Project Director of the Juvenile Court Intake and Referral Services Project. Judge White hired Ms. Forrester in 1977, appointed her project supervisor in 1979, and demoted and discharged her in 1980. He was, throughout the course of Ms. Forrester's employment, her direct supervisor.

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[1] In her position as Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, Ms. Forrester directed a program designed to divert juveniles from the court system. Her duties included administration, community and public relations, and direct intake work with juveniles. During the entire course of her employment, Ms. Forrester also performed juvenile probation work for the Jersey County Circuit Court. Her work as juvenile probation officer included investigation of complaints, referrals to social service agencies and assistance to the State's Attorney in the actual filing of cases. After a case was filed, she made recommendations for disposition and prepared presentence reports. She supervised juveniles on probation and when necessary recommended revocation. See pp. A-2—A-5.

Ms. Forrester instituted this action in the United States District Court for the Southern District of Illinois, alleging that defendant White demoted and discharged her because of her sex in violation of 42 U.S.C. Section 1983 and the Fourteenth Amendment to the U.S. Constitution.[2]

The case was tried to a jury before U.S. Magistrate Gerald B. Cohn on January 3, 4, 5, 6 and 9, 1984. The jury returned a verdict for Ms. Forrester and against Judge White on Ms. Forrester's claims of sex discrimination and assessed her damages of $81,818.80. Judgment to that effect was entered on January 10, 1984.

By an Order dated March 16, 1984, Magistrate Cohn denied Defendant White's Motion for Judgment Notwithstanding the Verdict but granted White's Motion for New Trial.[3]

On March 30, 1984, Defendant White filed a Motion for Summary Judgment arguing that the doctrine of judicial immunity barred Ms. Forrester's claim for damages. The Motion was granted and judgment was entered in favor of Defendant White on April 13, 1984.

The Court of Appeals for the Seventh Circuit upheld the decision of the District Court in a two to one decision written by Judge Eschbach, with Judge Posner dissenting. On September 11, 1986, the Seventh Circuit denied Ms. Forrester's Petition for

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[2] Claims against other individuals and against Jersey County, as well as claims under other federal statutes, have been dismissed from the case.

[3] The Seventh Circuit noted in its opinion that Ms. Forrester's appeal challenges the grant of a new trial as well as the grant of summary judgment. The Court of Appeals did not, however, reach that issue in view of its decision that Judge White was absolutely immune from civil damage liability. See p. A-6, n.3.

Rehearing and Suggestion for Rehearing En Banc, with Judges Cudahy, Posner and Easterbrook voting to grant a rehearing *en banc*.

A Petition for Writ of Certiorari was filed with this Court on November 10, 1986 and granted on February 28, 1987.

SUMMARY OF ARGUMENT

This Court has adopted a "functional" approach to immunity law, limiting the defense of absolute official immunity to those situations in which judges, prosecutors and legislators are directly engaged in the function which is to be protected. *Harlow v. Fitzgerald,* 457 U.S. 800 (1981). As the doctrine of judicial immunity has evolved since common law, its primary purpose has been to protect independent, fearless judicial decision-making from the threat of lawsuits filed by dissatisfied litigants. *Pulliam v. Allen,* 466 U.S. 52 (1984). In *Butz v. Economou,* 438 U.S. 478, 507 (1978), this Court ruled that the grant of absolute official immunity should be limited to those *exceptional situations* where it is *essential* to accomplish its objectives.

Judicial immunity protects a judge against a civil suit for damages in those situations where he is engaged in a judicial act and has jurisdiction over the subject matter before him. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1871); *Stump v. Sparkman,* 435 U.S. 349 (1978); *Supreme Court of Virginia v. Consumer's Union of America,* 446 U.S. 719, 731 (1980).

The decision of the U.S. Court of Appeals for the Seventh Circuit in this case extends judicial immunity to a judge's personnel decisions to demote and discharge a subordinate employee. By expanding the scope of the doctrine to reach a judge's employment decisions, the Seventh Circuit rejects precedent defining judicial acts as "acts of adjudication." Acts of adjudication are characterized by the presence of "parties

litigant" and "a controversy to be adjudicated." *Supreme Court of Virginia v. Consumer's Union,* 446 U.S. at 731.

An employment decision to demote or discharge a subordinate employee is not an "act of adjudication". This Court must, therefore, declare that the doctrine of judicial immunity does not bar a civil action for damages against a judge for demoting and discharging a court employee on account of her sex.

ARGUMENT

I. The Decisions Of This Court Adopt A "Functional" Approach Limiting The Scope Of Absolute Immunity

Absolute immunity from liability for unconstitutional conduct can only be justified by the special function or constitutional status of the governmental official who claims its protection. In *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982), this Court emphasized that absolute immunity is the exception, rather than the rule, for governmental officials and stressed that it is available only when public policy requires an exemption of that scope.

The decisions of this court have recognized the availability of absolute immunity for legislators, *Eastland v. United States Serviceman's Fund,* 421 U.S. 491 (1975), judges, *Stump v. Sparkman,* 435 U.S. 349 (1978), prosecutors, *Imbler v. Pachtman,* 424 U.S. 409 (1976), and the President of the United States, *Nixon v. Fitzgerald,* 457 U.S. 731 (1982). With the exception of the President, whose unique Consitutional role justifies absolute immunity for all his official acts, *id.* at 749, governmental officials to whom absolute immunity is available are shielded from liability only when they are exercising the function the immunity is designed to protect. *Harlow v. Fitzgerald,* 457 U.S. at 810-811.

This Court, in *Harlow* characterized its approach to immunity law as a "functional" approach:

> We have recognized that the judicial prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant.

Id. at 810-811. *Harlow's* articulation of these general principles simply recognizes this Court's historically consistent refusal to extend absolute immunity to all acts of judges, legislators and prosecutors.

This Court has ruled that not all official acts performed by judges are judicial acts. *Supreme Court of Virginia v. Consumer's Union of America,* 446 U.S. 719, 731 (1980); *Stump v. Sparkman,* 435 U.S. 349, 360-363 (1978). The instant case requires this Court to clearly distinguish between judicial acts or acts of adjudication and other official, though not judicial, acts of judges.

In *Gravel v. United States,* 408 U.S. 606, 624-625 (1972), this Court ruled that legislative immunity, derived from the Speech or Debate Clause of the U.S. Constitution, will not be extended beyond the "legislative sphere." Noting that legislators often perform acts in their official capacity which are not legislative in nature, Justice White described legislative acts in this way:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. at 625. If an act, even an official act, of a Member of Congress is not legislative, then the Member is not absolutely immune from an action for damages based on that act.

Similarly, in *Imbler v. Pachtman,* 424 U.S. 409, 430-431 (1976), this Court recognized that it would be necessary to draw a line between prosecutorial functions like the initiation of a prosecution and the presentation of the State's case, and other official acts carried out by prosecutors. While stating that there might be some difficulty drawing that line, the decision recognizes nonetheless that "at some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator," and would not be entitled to absolute immunity for such decisions. *Id.* at 431, n.33.

The absolute immunity extended in each of these areas has always been narrowly drawn. This Court's unwillingness to extend absolute immunity beyond the special functions which require special protection is based upon a recognition of the importance of a damages remedy to protect the rights, particularly the constitutional rights, of citizens. *Harlow v. Fitzgerald,* 457 U.S. at 807; *Butz v. Economou,* 438 U.S. 478, 504-506 (1978). Inevitably, immunity law involves a balancing of this important value with a competing need to encourage governmental officers to vigorously exercise governmental authority. In attempting to strike an appropriate balance, absolute immunity will be extended only where it is "essential for the conduct of the public business", *id.* at 507, and only after this Court has undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 508.

II. The Historic Purpose Of The Doctrine Of Judicial Immunity Is To Assure Independent, Fearless Decision-Making And It Is Justified By The Potential To Correct Judicial Error On Appeal.

Official immunities are creatures of common law which have "in large part been of judicial making." *Butz v. Economou,* 438 U.S. at 501-502 (quoting *Barr v. Mateo,* 360 U.S. 564, 569 (1959)). Judicial immunity is wholly derived from the common law, having no constitutional or statutory origin.[4] *Pulliam v. Allen,* 466 U.S. 522 (1984). A proper analysis of whether Judge White's personnel decisions are protected by judicial immunity

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[4] This distinguishes judicial from legislative immunity which derives from both the common law and Article I, Section 6, cl. 1 of the Constitution, the Speech or Debate Clause. *Tenney v. Brandhove,* 341 U.S. 367 (1951). Legislative immunity which derives from the Constitution and is, therefore, derived from higher authority, has, nonetheless, been carefully limited in this Court's decisions interpreting its scope. E.g., *Gravel v. United States,* 408 U.S. 606 (1972); *Hutchinson v. Proxmire,* 443 U.S. 111 (1979).

must, of necessity, begin with an examination of the doctrine's purposes at common law. *Mitchell v. Forsyth*, 474 U.S. ____, 86 L.Ed.2d 411, 422 (1985).

While the modern commentators articulate a variety of justifications for the doctrine of judicial immunity, two major purposes have informed the development of the doctrine.[5] These are the public interest in independent, fearless decision-making and the need to protect the finality of judgments from collateral attack.[6] As early as the seventeenth century, Lord Coke articulated these objectives in the seminal case of *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607); *see* Block, *supra* note 3, at 885-887.

The earliest substantive discussion of the purposes of the doctrine by this Court is found in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) which articulates the same two policy bases for judicial immunity. With regard to the need to foster independent, fearless decision-making, Justice Field states:

> . . .(I)t is a general principle of the highest importance to the proper administration of justice that a judicial officer,

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[5] *See, e.g.*, Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 271-272 (1937); Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity*, 64 Va. L. Rev. 833, 855 n. 90; King, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Ariz. L. Rev. 549, 579-588. Two recent exhaustive commentaries trace the history of the doctrine: Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. Rev. 201 (1980) and Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879 (1980).

[6] Although Block, *supra* note 5, and Feinman & Cohen, *supra* note 5, differ about which of these purposes was paramount, each article recognizes the common law's objective to accomplish both purposes through shielding judges from suit for judicial acts taken in their judicial capacity.

> in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

Id. at 347. He articulates the need for finality in this way:

> If . . . a judge could be compelled to answer in a civil action for his judicial acts . . . he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

Id., at 349.

Modern American cases tend to focus on the policy of protecting judicial independence, *e.g.*, *Pulliam v. Allen*, 466 U.S. at 531, and at 546-47 (Powell J., dissenting), but *Bradley* foreshadows a concern also articulated in this Court's modern opinions and closely akin to the objective of shielding judgments from collateral attack: the availability of appellate correction of error. *Bradley* justifies the imposition of the doctrine, at least in part, on that basis:

> Against the consequences of their erroneous or irregular action from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort.

Id., at 354. Where resort to appellate or other judicial remedies is not available to a party injured by a judge's error, an important justification for the doctrine is missing. *See also, Butz v. Economou*, 438 U.S. at 512; *Cleavinger v. Saxner*, 474 U.S.

____, 88 L.Ed.2d 507, 516; *Stump v. Sparkman,* 435 U.S. 349, 369-370 (Powell, J. dissenting). In determining whether judicial immunity bars a civil action for damages then, precedent requires analysis of whether the imposition of the doctrine will serve to further the public interest in independent, fearless judicial decision-making and whether the judge's action may be otherwise corrected on appeal.

III. This Court's Decisions Require That The Doctrine Of Judicial Immunity Be Applied Only When Judges Are Engaged In Adjudicative Functions

A. The Judicial Act Requirement

This Court adopted the common law's limitation of the doctrine of judicial immunity to those situations in which a judge is engaged in a "judicial act" in *Bradley v. Fisher,* 80 U.S. at 347. However, a standard for determining what constitutes a judicial act was first articulated in *Ex Parte Virginia,* 100 U.S. 339 (1880). The county court judge in that case was indicted for race discrimination in the selection of jurors for his court. Virginia law committed the responsibility for selecting jurors to county judges and, thus, his act was clearly an official act. This Court rejected the notion that the selection of jurors is a judicial act:

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge.... That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc. Is their election or their appointment a judicial act?

Id. at 348. The act at issue in *Ex Parte Virginia,* like the acts for which the respondent in the instant case was sued, is not an act

entrusted to a judge in his adjudicative capacity. It is, in essence, an administrative act.[7]

In *Stump v. Sparkman,* 435 U.S. 349 (1978), this Court was faced with the issue of whether a judge's *ex parte* approval of a mother's petition for authority to have her daughter sterilized was a judicial act, thus rendering the judge immune from a civil suit for damages. This Court ruled that the judge's act was a judicial act, based on application of a two-pronged test which requires consideration of whether the act is "a function normally performed by a judge, and . . . whether (the parties) dealt with the judge in his judicial capacity." *Id.* at 362.

This Court defined a judicial act as an "act of adjudication" in *Supreme Court of Virginia v. Consumer's Union of America,* 446 U.S. 719, 731 (1980). Arising in the context of a challenge to a bar ethical code issued by the Supreme Court of Virginia, the decision holds that since ethical rules "act not on parties litigant" and do "not arise out of a controversy which must be adjudicated," their issuance is not a judicial act. *Id.* at 731. The decision stands for the proposition that the unique function which judges perform in our system of government which entitles them to the special protection of the doctrine of judicial immunity is that they "adjudicate".[8]

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[7] The Court in *Ex Parte Virginia,* 100 U.S. at 348, calls the act in question ministerial as opposed to judicial. The judicial-ministerial distinction has been largely abandoned. Block, *supra* note 3, at 902-903. Modern opinions make the more accurate distinction between judicial and administrative acts. *See, e.g., Goodwin v. Circuit Court,* 729 F.2d 541, 549 (8th Cir. 1984).

[8] The judicial function has been described as: . . . typically characterized by the exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, the declaration or alteration of the rights and obligations of individuals, and certain procedural attributes." Block, *supra* note 5, at 892.

Applying the definition articulated in *Consumer's Union*, this Court ruled in *Butz v. Economou*, 438 U.S. 478 (1978), that federal agency officials performing adjudicatory functions are also entitled to judicial immunity when performing judicial acts. The "conflicts" and "controversies", which these agency officials are called upon to hear, share characteristics of the judicial process. While performing their functions, these officials "issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.* at 53. These acts are integral elements of the traditional judicial decision-making function and thus agency officials are entitled to judicial immunity when performing them.

Most recently, this Court rejected a claim of absolute judicial immunity asserted by prison officials sitting as a prison's discipline committee in *Cleavinger v. Saxner*, 474 U.S. ____, 88 L.Ed.2d 507 (1985). Noting that the usual attributes of a judicial proceeding — representation by counsel, right to compel attendance of witnesses, right to cross-examine, discovery mechanisms, verbatim transcript, and independent impartial decision-maker — were not present, this Court refused to extend judicial immunity. In the absence of these attributes of adjudication, there is no judicial act and, therefore, no entitlement to judicial immunity.

B. The Jurisdictional Limit on Judicial Immunity

As early as the decision in *Bradley*, 80 U.S. at 351 and as recently as *Stump*, 435 U.S. at 356, this Court has consistently required that, in addition to being engaged in a judicial act, a judge must also have jurisdiction in order to invoke the protection of judicial immunity. At first glance, this requirement would appear irrelevant to the instant case since jurisdiction is not an issue with respect to a personnel decision. However, the jurisdictional requirement is actually another clear indication that this Court's decisions do not contemplate the application of judicial immunity to protect a judge's conduct outside the adjudicative decision-making arena.

Both *Stump*, 435 U.S. at 356-359, and *Bradley*, 80 U.S. at 351-353 deal with the jurisdictional requirement in a technical sense. The discussion of whether the judge in *Stump* had jurisdiction, 435 U.S. at 356-359, is a technical discussion of subject matter jurisdiction, addressing the judge's power to hear and decide the matter presented to him in that case. The opinion states explicitly that in order to determine whether a judge is immune from suit, it is "necessary" to inquire whether "at the time he took the challenged action he had jurisdiction over the subject matter before him." *Id.* at 356. When a judge is engaged in conduct outside the adjudicative arena, jurisdiction is not a relevant issue. In such cases he is not in fact engaged in a judicial act and does not have judicial immunity.

IV. The Seventh Circuit's Decision Expands The Doctrine Of Judicial Immunity Beyond The Limits Created By This Court's Decisions And Beyond The Scope Required To Effectuate Its Purposes

The U. S. Court of Appeals for the Seventh Circuit holds that decisions to demote and discharge a court employee are judicial acts for which a judge is entitled to judicial immunity, if the functions performed by that employee are "inextricably tied to discretionary decisions that have consistently been considered judicial acts", A-2. This Court should apply the *Consumer's Union* definition of judicial act, rule that an employment decision is not a judicial act because it is not an "act of adjudication", and reverse the decision of the Court of Appeals. The decision must be overturned because it misconstrues the term judicial act, ignores relevant precedent, and extends the doctrine of judicial immunity far beyond its historically narrow purpose.

The Seventh Circuit opinion focuses erroneously on the nature of the relationship between the judge and his employee, instead of analyzing the character of the act in question. *Ex Parte Virginia*, 100 U.S. at 348. It is only "acts of adjudication" which constitute judicial acts entitled to the pro-

tection of the doctrine of judicial immunity. The failure to distinguish acts taken by judges in their special adjudicatory function from other official acts is, as Judge Posner points out in his dissent to the Seventh Circuit's opinion, A-31, "the fatal weakness" of the majority opinion.[9]

The rationale articulated by the Seventh Circuit would arguably shield every official act of a judge from a civil action for damages. Implicit in the court's reliance on the Illinois law which authorizes a judge to hire and fire juvenile probation officers is the notion that any act committed to judges by statute is a judicial act. *Consumer's Union* rejects precisely such a result.[10]

The requirement that a judge have subject matter jurisdiction over the act for which he asserts immunity is also misconstrued by the opinion, which equates jurisdiction with authority, and finds that Judge White was acting with jurisdiction because of his statutory authority to hire and fire. The opinion, at A-16 -A-17, ascribes to the term jurisdiction its generic rather than its

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[9] Two other U.S. Courts of Appeals decisions provide well-reasoned analyses of why employment decisions do not constitute judicial acts. These are *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986) and *Goodwin v. Circuit Court*, 729 F.2d 541, 549 (8th Cir. 1984). *See also*, in the legislative immunity context, *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (5th Cir.), *rev'd*, 442 U.S. 228 (1979).

[10] *See also, Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970), a case cited with approval in *Stump*, 435 U.S. at 361 n. 10, in which a county judge was sued for conduct engaged in while presiding over a meeting of a legislative and administrative fiscal court, where the court ruled that such conduct is not a judicial function even when the duty is assigned by state statute; and *Ex Parte Virginia*, 100 U.S. 339 (1880) where the fact that the judge was engaged in a function assigned to him by state law had no impact on this Court's determination that he was not engaged in a judicial act.

technical meaning and is, thus, at odds with the treatment of jurisdiction as a technical matter in *Stump* and *Bradley*. Judge White cannot be shown to have been acting with subject matter jurisdiction when he fired Cynthia Forrester because he was not involved in hearing and deciding a case. Judges only have jurisdiction in the technical sense when engaged in their adjudicative function.

The Seventh Circuit's opinion extends the doctrine of judicial immunity to situations not heretofore contemplated by the decisions of this Court. The determination of whether such an extension is appropriate must depend upon whether it is *essential* to effectuate the purposes of the doctrine. *Butz v. Economou*, 438 U.S. at 507. If it is the potential for lawsuits filed by dissatisfied litigants that threatens independent, fearless judicial decision-making and justifies the judicial immunity doctrine, then the inquiry must be whether granting judicial immunity for employment decisions will discourage suits by litigants dissatisfied with the judges' rulings in their cases. The Seventh Circuit's only suggestion that its ruling furthers that purpose is the strained conclusion at A-21, that a "judge may be open to suits from litigants who discover that his professional relationship with his probation officer has declined, and he may thus expose himself to charges of impropriety and lose the respect necessary for the effective discharge of his responsibilities."

Even if one were to accept the Seventh Circuit's conclusion that a judge's declining relationship with his juvenile probation officer might lead litigants before him to charge impropriety, a judge has nothing to fear. For "judges . . . are not liable to civil actions for their judicial acts, even when such acts are . . . alleged to have been done maliciously or corruptly." *Bradley v. Fisher*, 80 U.S. at 351. Thus, by expanding the doctrine of judicial immunity to include employment decisions the Seventh Circuit provides a judge with no additional protection against charges of impropriety and deprives an employee of a rightful remedy.

Under the rule established by the Seventh Circuit, the purpose of encouraging judges to act in an independent, fearless manner in deciding cases cannot be achieved in any event. The answer to the question of whether there is absolute immunity for a particular employment decision will turn, in the words of the opinion, on "the nature of the relationship" between the judge and the employee. See A-20. A judge will be required to analyze the duties of a particular employee to determine whether a personnel decision is shielded by absolute immunity. Thus, the decision fails to provide judges a clear guide to the potential consequences of their acts.

Further, since the "nature of the relationship" between judge and employee depends on the facts of each case, this approach will not deter litigation. The question of whether the interaction between a particular judge and a specific staff member is "dominated by acts" which "implicate the decisions of the judge *qua* judge" is a factual issue. Court employees who bring suit will argue that they were not associated with the judicial decision-making process and defendant judges will argue that they were.[11] Since factual disputes cannot be decided on motions for summary judgment, *Harlow v. Fitzgerald*, 457 U.S. at 816, a rule dependent upon the facts of each individual case, like the rule articulated by the Seventh Circuit in this case, does not avoid litigation against judges, the primary purpose for the doctrine.

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[11] The case at bar is a useful example of this problem. There is no doubt, *see infra* p. 3, that plaintiff had substantial duties that were totally unconnected with Judge White's judicial decision-making function. She was, after all, the director of a program created to keep juveniles out of the court system. Had this case been tried after a Seventh Circuit opinion similar to the instant one, counsel for plaintiff would have introduced evidence to the effect that an inconsequential portion of plaintiff's duties involved providing advice and information to Judge White in his decision-making capacity and argued that since her relationship with the Judge was not "dominated" by judicial acts, judicial immunity did not bar her claim.

Without a clear and unambiguous general rule, the extension of absolute immunity to the types of decisions at issue here serves no legitimate purpose. As Judge Posner points out in his dissent:

> Absolute immunity provides real security only if the scope of the immunity is well defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what. We shall still have to buy liability insurance. A-33.

Since the rule articulated by the Seventh Circuit fails in any meaningful way to advance the purpose of the doctrine, the fact that a judge's discharge decision is not correctible on appeal becomes a more serious issue. The "correctibility of error on appeal" is one of the safeguards built into the judicial system. Becuase such safeguards "tend to reduce the need for private damages actions," *Butz v. Economou,* 438 U.S. at 512, they justify the sometimes harsh results occasioned by the imposition of judicial immunity. The Seventh Circuit opinion fails to strike the proper balance between the purpose of the doctrine and the importance of a damages remedy to protect the rights of citizens. Since extension of the doctrine of judicial immunity to employment decisions is not *essential* to effectuate the purposes of the doctrine, this Court should not deny to citizens what may be the only remedy available to them to protect important constitutional rights.

CONCLUSION

This Court must reverse the Seventh Circuit's decision because it represents an expansion of the doctrine of judicial immunity well beyond its scope at common law and the parameters established by this Court's decisions. This expansion is not warranted by the policy underlying the doctrine nor will it effectively advance the doctrine's legitimate purposes. This Court should hold that an employment decision is not a judicial act because it is not an "act of adjudication" and that, therefore, judicial immunity does not bar a civil action for damages for sex discrimination in employment.

This Court should reverse the Seventh Circuit's decision and remand the case to the Court of Appeals for a ruling on Petitioner's challenge to the District Court Order granting a new trial in this matter.

Respectfully submitted,

Mary Anne Sedey
(Counsel of Record)
2608 South Kingshighway
St. Louis, Missouri 63139
(314) 773-3566

Counsel for Petitioner

FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Respondent

ROSALYN B. KAPLAN *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2130
Of Counsel

* Counsel of Record

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QUESTION PRESENTED

Whether the doctrine of judicial immunity shields a state-court judge from liability for damages in a Section 1983 action for alleged sex-based discrimination arising from the dismissal of a probation officer who performed duties which were an integral part of the judge's decision-making process?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I.	
The Court Of Appeals Ruled On The Basis Of A Particular Employment Relationship And Its Implications For The Judicial Decision-Making Process	6
II.	
An Illinois Probation Officer Acts As An Essential Assistant To The Judge In The Execution Of His Judicial Functions	7
III.	
A Judge Is Entitled To Absolute Immunity From Liability For Damages Sought On The Basis Of A Judicial Act Taken Within The Scope Of His Jurisdiction	11
A. Judge White Acted Within The Scope Of His Jurisdiction In Demoting And Firing Ms. Forrester	14
B. Judge White Performed Judicial Acts When He Demoted And Fired His Probation Officer	16

1. The Nature Of The Act: Firing A Probation Officer Is A Function Normally Performed By A Judge 17

2. The Expectations Of The Parties: A Probation Officer Deals With A Judge In His Judicial Capacity 19

C. Allowance Of Judicial Immunity With Respect To This Type Of Employment Decision Is Consistent With The Underlying Purpose Of This Defense 23

D. Employment Decisions Considered By The Courts In Connection With Other Immunities Provide Guidelines For The Resolution Of This Case 28

CONCLUSION 33

APPENDIX:

42 U.S.C. § 1983 ..... App. 1

Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979) ..... App. 1

Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979) ..... App. 3

Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979) ..... App. 4

Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979) ..... App. 6

TABLE OF AUTHORITIES

Cases	Page
Abbott v. Thetford, 529 F.2d 695, *dissent adopted as en banc opinion on rehearing*, 534 F.2d 1101 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977)	10
Agromayor v. Colberg, 738 F.2d 55 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984)	5, 30
Barr v. Mateo, 360 U.S. 564 (1959)	28
Birdsong v. Dirck, 633 F. Supp. 54 (E.D. Mo. 1984)	30
Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983)	22, 25
Bostick v. Rappleyea, 629 F. Supp. 1328 (N.D.N.Y. 1985)	30
Bradley v. Fisher, 13 Wall. (80 U.S.) 335 (1872)	*passim*
Briscoe v. LaHue, 460 U.S. 325 (1983)	12, 13, 19
Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923, *reh. denied*, 793 F.2d 380 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 601 (1986)	5, 31, 32
Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971)	10
Butz v. Economou, 438 U.S. 478 (1978)	13, 19, 24
Chocallo v. Bureau of Hearings & Appeals, SSA, 548 F. Supp. 1349 (E.D. Pa. 1982), *aff'd*, 716 F.2d 889 (3d Cir.), *cert. denied*, 464 U.S. 983 (1983)	18
Clark v. Campbell, 514 F. Supp. 1300 (W.D. Ark. 1981)	26
In re Cooper, 22 N.Y. 67 (1860)	15

Cronovich v. Dunn, 573 F. Supp. 1340 (E.D. Mich. 1983) 25

Crooks v. Maynard, No. 86-3629 (9th Cir. June 24, 1987) 21

Crosby-Bey v. Jansson, 586 F. Supp. 96 (D.D.C. 1984) 10

Davis v. Passman, 442 U.S. 228 (1979) 25, 29

Davis v. Passman, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc*, 571 F.2d 793 (5th Cir. 1978), *rev'd*, 442 U.S. 228 (1979) 30

Demoran v. Witt, 781 F.2d 155 (9th Cir. 1986) ... 9, 19

Doe v. County of Lake, 399 F. Supp. 553 (N.D. Ind. 1975) 22

Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) 30

Forrester v. White, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S. Ct. 1282 (1987) ..... *passim*

Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir. 1984) 26

Gravel v. United States, 408 U.S. 606, *reh. denied*, 409 U.S. 902 (1972) 10, 29, 31

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 11, 12, 15

Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) 17

Guercio v. Brody, 814 F.2d 1115 (6th Cir. 1987) .. 27

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 13

Hudson v. Burke, 617 F. Supp. 1501 (N.D. Ill. 1985) 30

Imbler v. Pachtman, 424 U.S. 409 (1976) 12, 13, 18

Laskowski v. Mears, 600 F. Supp. 1568 (N.D. Ind. 1985) 25

Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980) 18

Lowe v. Letsinger, 772 F.2d 308 (7th Cir. 1985) .. 18

Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983) 26

Martinez v. Winner, 771 F.2d 424, *modified on other grounds*, 778 F.2d 554 (10th Cir. 1985), *vacated sub nom. Tyus v. Martinez*, ___ U.S. ___, 106 S. Ct. 1787 (1986), *vacated as moot*, 800 F.2d 230 (10th Cir. 1986) 18

Mason v. Twenty-Sixth Judicial District of Kansas, No. 86-2103-S (D. Kan. April 8, 1987) 25

McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972) 15

McMillan v. Svetanoff, 793 F.2d 149 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 574 (1986) 7, 27

Moore v. Burger, 655 F.2d 1265 (D.C. Cir. 1981) 12

Nixon v. Fitzgerald, 457 U.S. 731 (1982) ..... *passim*

O'Shea v. Littleton, 414 U.S. 488 (1974) 13

Pierson v. Ray, 386 U.S. 547 (1967) 11, 12, 28

Pruitt v. Kimbrough, 536 F. Supp. 764 (N.D. Ind. 1982), *aff'd*, 705 F.2d 462 (7th Cir. 1983) 25

Pulliam v. Allen, 466 U.S. 522 (1984) 20, 24

Randall v. Brigham, 7 Wall. (74 U.S.) 523 (1869) 12, 15, 17, 24

Retail Clerks International Association v. Leonard, 450 F. Supp. 663 (E.D. Pa. 1978) 26

Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981) 18

Scott v. Stansfield, L.R. 3 Ex. 220 (1868) 11

Ex parte Secombe, 19 How. (60 U.S.) 9 (1857) 18

Shore v. Howard, 414 F. Supp. 379 (N.D.Tex. 1976) 25, 26

Slavin v. Curry, 574 F.2d 1256, *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978) 18

Spaulding v. Nielsen, 599 F.2d 728 (5th Cir. 1979) 10, 19

State ex rel. Hovey v. Noble, 118 Ind. 350, 21 N.E. 244 (1889) 15

Stump v. Sparkman, 435 U.S. 349, *reh. denied*, 436 U.S. 951 (1978) ..... *passim*

Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980) .. 17

Taaffe v. Downes, set forth in note (a) of *Calder v. Halket*, 3 Moore, P.C. 28 (1840) 12, 20

Tenney v. Brandhove, 341 U.S. 367, *reh. denied*, 342 U.S. 843 (1951) 12, 29, 31

Tripati v. United States Immigration & Naturalization Services, 784 F.2d 345 (10th Cir. 1986) 10, 19

United States v. Brewster, 408 U.S. 501 (1972) .. 29

Ex parte Virginia, 100 U.S. 339 (1880) 20, 25

Walker v. Jones, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984) 31

Witter v. Cook County Commissioners, 256 Ill. 616, 100 N.E. 148 (1912) 7, 8, 15

Statutes

Federal:

42 U.S.C. § 1983 12

State:

Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979) 8

Ill. Rev. Stat. ch. 37, ¶ 706-1 (1985) 8

Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979) 8, 15

Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979) 8, 16

Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979) 8

Ill. Rev. Stat. ch. 38, ¶ 204-7(2)(b) (1986 Supp.) .. 8

Ill. Rev. Stat. ch. 110A, ¶¶ 61, 62, 63, 71 (1986 Supp.) 13

Public Act 84-692, approved September 20, 1985, II Laws of Illinois, 84th Gen. Assembly, 1985 Session 4423 8

Public Act 84-823, approved September 22, 1985, II Laws of Illinois, 84th Gen. Assembly, 1985 Session 5089 8

Public Act 84-1308, approved August 25, 1986, 7 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 1 8

Public Act 84-1395, approved September 18, 1986, 8 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 574 .. 8

Public Act 84-1438, approved December 22, 1986, 10 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 46 8

Miscellaneous

Biddle, *Liability of Officers Acting in a Judicial Capacity*, 15 American Law Review 427 (July 1881) 20

Marvel & Dempsey, *Growth in State Judgeships, 1970-1984: What Factors are Important?*, 68 Judicature 274 (February-March 1985) 10

Weisberger, *The Twilight of Judicial Independence—Pulliam v. Allen*, 19 Suffolk University Law Review 537 (Fall 1985) 24

1986 Annual Report of the Director of the Administrative Office of the United States Courts .. 23

No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

STATUTES INVOLVED

42 U.S.C. § 1983
Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979)
Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979)
Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979)
Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979)

The above statutory provisions are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

The respondent, Howard Lee White (sometimes referred to as the defendant), was, at all material times, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois, serving as Presiding Judge of the Circuit Court of Jersey County, Illinois (A-2).[1] In April 1977, Judge White hired the petitioner, Cynthia Forrester (sometimes referred to as the plaintiff), to serve as a juvenile and adult probation officer (*id.*). Throughout her employment, Judge White was Ms. Forrester's immediate supervisor (*id.*).

As an adult probation officer, plaintiff's duties included: preparation of presentencing reports in all felony cases; monitoring adult probationers; and filing recommendations for revocations as necessary (A-3 - A-4). As a juvenile probation officer, she received and investigated complaints; provided counseling or made referrals to social agencies; assisted the State's Attorney in filing juvenile court cases; and assisted in preparing those cases for hearing (A-5). She also made recommendations for dispositions and prepared presentencing reports for the judge (*id.*). When a disposition resulted in the placement of a juvenile under court supervision or on probation, she monitored the juvenile and recommended revocations as necessary (*id.*).

In July 1979, Judge White appointed Ms. Forrester to be supervisor of the Jersey County Juvenile Court Intake and Referral Services Project; in addition to her new duties with the Project, plaintiff continued to do juvenile probation work (A-5).

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[1] "A-" denotes a reference to the Appendix to the Petition for Writ of Certiorari.

Judge White discharged Ms. Forrester on October 1, 1980 (A-5). In July 1982, she filed an action in federal district court claiming that defendant had first demoted and then discharged her in violation of her right to be free from discrimination in employment on the basis of sex (A-38, A-6). Although she originally sought relief on Title VII grounds against Judge White and other defendants, and on Section 1983 grounds against the judge alone, plaintiff is now pursuing only her Section 1983 claim for damages.[2]

On April 13, 1984, the district court granted defendant's motion for summary judgment, ruling that Judge White was absolutely immune from liability for damages in this case (A-54). Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit from that ruling and from the order granting defendant a new trial (see note 2). The Seventh Circuit ruled only on the immunity issue, assuming for that purpose that Judge White demoted and dismissed plaintiff on the basis of her sex (A-6). In a two-to-one decision, the court of appeals upheld the district court's decision on the immunity issue (A-1 - A-33).

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[2] Plaintiff's Title VII claim against Judge White, the Seventh Judicial Circuit, and Jersey County was tried simultaneously with her § 1983 action (A-39). Following a jury verdict in plaintiff's favor on the § 1983 claim, and entry of judgment on the verdict, the Title VII claim was dismissed pursuant to the stipulation of all parties (*id.*). Judge White's motion for a new trial was granted on March 16, 1984 (A-48); on March 30, 1984, he filed a motion for summary judgment asserting the claim of judicial immunity which is the subject of this case as it comes before this Court (A-49).

SUMMARY OF ARGUMENT

The narrow question before this Court is whether a judge is entitled to absolute immunity for discharging an employee whose functions are an integral part of the judicial process. In this case, the employee was a probation officer whose information and advice to the judge directly implicated his discretionary judgment in sentencing, probation and revocation decisions. This personnel action merits the defense of judicial immunity to protect principled, independent decision-making.

The discharge of a probation officer is a "judicial act" within the scope of the "jurisdiction" of a circuit court judge, as those terms are to be analyzed and applied in evaluating a claim of absolute immunity. *Stump v. Sparkman*, 435 U.S. 349, *reh. denied*, 436 U.S. 951 (1978). "Jurisdiction," which must be construed broadly, *id.* at 356, describes the general authority of a judge to act; a court acts with jurisdiction not only when it enters an order in a controversy between litigants but in other circumstances, such as when it admits or disbars an attorney. *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 354 (1872). By analogy, a judge who has inherent and statutory authority to hire or fire a probation officer acts within the scope of his jurisdiction when he performs such an action.

The two *Stump* criteria which identify a "judicial act" are satisfied in this case. In Illinois, the hiring or firing of a probation officer is a function normally performed by a judge. *Stump*, 435 U.S. at 362. Additionally, a probation officer deals with a judge in the latter's judicial capacity. *Id.* The working relationship between a judge and his probation officer must be distinguished from that

which exists between a judge and a janitor, for example. The latter situation is not unlike that of any private or governmental employer and employee. However, a probation officer's duties and entire employment relationship exist by virtue of that employee's interaction with the judge *qua* judge.

A judge should not be required to choose between risking a lawsuit for the discharge of his probation officer and protecting the quality of his sentencing decisions, which inevitably reflect the input of that employee. The Court should avoid the rote use of labels to denote whole categories of actions as administrative or ministerial, rather than judicial. As has been done by the *Forrester* Court and others which have allowed immunity defenses for certain employment decisions by judges, this Court should examine the personnel action with reference to the duties performed by the employee and the relationship of those duties to the judicial process. The necessary analysis resembles that performed by the circuit courts of appeals which have allowed the defense of legislative immunity in analogous situations. *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, *reh. denied*, 793 F.2d 380 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 107 S. Ct. 601 (1986); *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984).

ARGUMENT

I.

THE COURT OF APPEALS RULED ON THE BASIS OF A PARTICULAR EMPLOYMENT RELATIONSHIP AND ITS IMPLICATIONS FOR THE JUDICIAL DECISION-MAKING PROCESS.

The court of appeals held that Judge White's decisions to demote and dismiss the plaintiff were judicial acts performed within the scope of his authority (A-22). *Forrester v. White*, 792 F.2d 647, 658 (7th Cir. 1986), *cert. granted*, ___ U.S. ___, 107 S. Ct. 1282 (1987). Accordingly, it ruled, "under the facts of this case," that the judge was entitled to absolute immunity from liability for damages in Ms. Forrester's civil rights action, in which she had alleged that her demotion and termination were the result of discrimination against her on the basis of her sex. *Id.* The court stressed that it had decided the case by addressing only the circumstances of this particular employment relationship. *Id.*

The question which plaintiff has presented to this Court for review asks whether a judge will be protected by judicial immunity "for demoting and discharging a court employee on account of her sex." Brief of Petitioner at i. The opinion of the court of appeals neither raised nor decided so broad an issue. To the contrary, it cautioned against any application of the immunity defense on the basis of generalizations which fail to consider the specific attributes of an employment relationship in the context of the policies underlying a grant of judicial immunity. A fair reading of the opinion below reveals that plaintiff's question to this Court would indeed receive a negative answer from the Seventh Circuit in cases where the

duties of a given employee are not directly related to the exercise of judicial discretion.[3] In such situations, the employment relationship "would not implicate the judge's institutional role within the court system" (A-18). 792 F.2d at 656 n.9.

The analysis of this Court should similarly focus upon the nature of the duties of this probation officer in the Jersey County Circuit Court, as they were described by the court below. The carefully crafted opinion of the Seventh Circuit certainly lends itself to application in analogous employment situations which implicate similar concerns, to foster the goals of principled and independent decision-making which are at the heart of the doctrine of judicial immunity. The decision below should not, however, be construed or evaluated as a sweeping elimination of civil rights protections for every individual employed by a judicial or quasi-judicial body. Before turning to a discussion of judicial immunity and its application to an employment decision of a judge, a brief examination of the role of an Illinois probation officer is set forth, to highlight the nature of the working relationship within which the complained-of decisions were made in this case.

II.

AN ILLINOIS PROBATION OFFICER ACTS AS AN ESSENTIAL ASSISTANT TO THE JUDGE IN THE EXECUTION OF HIS JUDICIAL FUNCTIONS.

In *Witter v. Cook County Commissioners*, 256 Ill. 616, 100 N.E. 148 (1912), the Illinois Supreme Court voided a statutory provision, as violative of the state constitutional mandate of separation of powers, because the statute granted to certain county officials the power to ap-

[3] *See, e.g., McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 574 (1986).

point probation officers for the juvenile courts. The court explained that "[t]he investigation to be made by the probation officer is the investigation of the court through that officer as his assistant, by whom he performs the judicial duties and exercises judicial power." 256 Ill. at 623, 100 N.E. at 150. It concluded that the judiciary inherently had the power to select and discharge such assistants because that power "is necessary to the independent exercise of judicial power. . . ." *Id.* at 624, 100 N.E. at 150.

This view of the relationship between judges and probation officers is still in force today. The relevant statutes in effect during Ms. Forrester's tenure, and as recently amended,[4] continue to acknowledge ultimate judicial control over the selection of individuals to serve in these sensitive posts.

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[4] In the Appendix to this brief, defendant has included the statutory provisions in effect at the time of plaintiff's discharge describing: the functions and duties of juvenile probation officers, Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979); the appointment of juvenile probation officers, Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979); the appointment of adult probation officers, Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979); and the duties of adult probation officers. Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979). State laws governing the appointment and duties of probation officers have recently undergone a number of substantive and technical revisions: Public Act 84-692, approved September 20, 1985, II Laws of Illinois, 84th Gen. Assembly, 1985 Session 4423; Public Act 84-823, approved September 22, 1985, II Laws of Illinois, 84th Gen. Assembly, 1985 Session 5069; Public Act 84-1308, approved August 25, 1986, 7 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 1, §§ 48-49, 53-54 (technical revisory act); Public Act 84-1395, approved September 18, 1986, 8 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 574, §§ 5, 7; Public Act 84-1438, approved December 22, 1986, 10 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 46, § 17 (technical revisory act). However, the Chief Judge of each circuit still retains the authority to appoint probation officers. *See* Ill. Rev. Stat. ch. 38, ¶ 204-7(2)(b) (1986 Supp.). *See also* Ill. Rev. Stat. ch. 37, ¶ 706-1 (1985) (as amended by P.A. 84-823, § 2, effective April 1, 1986).

The responsibilities of adult and juvenile probation officers in Illinois encompass confidential and discretionary duties on behalf of the courts. In observing the relationship of the litigants in this case and the duties of the respondent, the court of appeals noted that plaintiff, as an adult probation officer, prepared presentence reports for the judge, monitored all adult probationers, and filed any necessary recommendations for revocation of parole (A-2 - A-4). 792 F.2d at 648-49. In her capacity as a juvenile probation officer, she performed investigative and counseling duties; assisted in preparing filed cases for hearings; made recommendations for dispositions; prepared presentencing reports for the judge; monitored juveniles placed under court supervision; and recommended revocations as necessary (A-4 - A-5). 792 F.2d at 649-50.[5]

The Seventh Circuit observed that plaintiff provided the judge with crucial information and advice which directly implicated his discretionary judgment in sentencing, probation and revocation decisions (A-19). 792 F.2d at 657. Case law suggests that probation officers employed in other jurisdictions may be similarly situated. *See, e.g., Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1986) ("Probation officers preparing presentencing reports serve a

[5] In July 1979, when Judge White made plaintiff supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, her duties were increased, but she continued to do juvenile probation work (A-5). 792 F.2d at 650. Plaintiff's suggestion to this Court that her advice-giving duties were "inconsequential" is simply an attempt to inject a new factual element beyond the scope of this case in its present posture (Brief of Petitioner at 18, n.11). Judge White's need to rely upon her for crucial information to execute his adjudicatory functions is not now subject to dispute, and it is plaintiff's input into the decision-making process, rather than any other duties which she also performed, which distinguishes her role as an employee and officer of the court.

function integral to the independent judicial process"); *Spaulding v. Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979) (preparation of presentencing report is " 'intimately associated with the judicial phase of the criminal process' " (citation omitted)); *Crosby-Bey v. Jansson*, 586 F. Supp. 96, 99 (D.D.C. 1984) ("[a] probation officer preparing a presentence report serves as the court's eyes and ears. . . ."). *See also Tripati v. United States Immigration & Naturalization Services*, 784 F.2d 345 (10th Cir. 1986); *Abbott v. Thetford*, 529 F.2d 695, 705 (Gewin, J., dissenting), *dissent adopted as en banc opinion on rehearing*, 534 F.2d 1101 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971).

A recent study demonstrated, on the basis of statistics available for the period 1973-82, that judicial caseloads have been increasing significantly in state courts, with criminal filings exceeding new civil matters and growing at approximately twice the rate of the creation of new trial judgeships. Marvell & Dempsey, *Growth in State Judgeships, 1970-1984: What Factors are Important?*, 68 Judicature 274, 280 (February-March 1985). These statistics emphasize the Seventh Circuit's observations regarding a modern judge's increasing need to rely on his staff for substantive input into the judicial process (A-14). *Forrester*, 792 F.2d at 654. No less than for legislators, it would be "literally impossible" for a judge to discharge all his duties without reliance on a staff member such as a probation officer. *Cf. Gravel v. United States*, 408 U.S. 606, 616, *reh. denied*, 409 U.S. 902 (1972).

As a judicial disposition regarding a juvenile or criminal defendant may often depend in great part upon the efforts of a probation officer, a judge must be able to trust this employee and rely upon his or her skill, discretion

and integrity. Judicial control of this working relationship is, therefore, an integral part of the process of independent decision-making. Judge White's claim of immunity in this action must be examined in this particular context.

III.

A JUDGE IS ENTITLED TO ABSOLUTE IMMUNITY FROM LIABILITY FOR DAMAGES SOUGHT ON THE BASIS OF A JUDICIAL ACT TAKEN WITHIN THE SCOPE OF HIS JURISDICTION.

It is settled that a state court judge is entitled to immunity from liability for damages so long as the action complained of was taken within the general scope of his jurisdiction, even if "in excess of" the jurisdictional grant, and was the exercise of a judicial function. *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872). Absolute immunity obtains regardless of the motives underlying the performance of a particular act, *id.*, protecting the innocent and guilty alike, because:

> it is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). The purpose of this immunity, of course, is not to shield a corrupt judge, but to insure to the public the benefits of a principled, independent judiciary, free to engage in judicial tasks without fear of intimidation. *Pierson v. Ray*, 386 U.S. 547, 554 (1967), *citing Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868). Without such immunity, judges would become "slaves in

every court that holds plea, to every sheriff, juror, attorney and plaintiff." *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 537 (1869), *citing Taaffe v. Downes*, note, 3 Moore P.C. Rep. 41.

Because of the overriding public policies served by absolute judicial immunity, this Court has repeatedly acknowledged the need for its forthright application, even when a genuinely wronged individual may find himself without any other means of civil redress. *Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.37 (1982); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).[6] "[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire*, 177 F.2d at 581, *cited with approval in Briscoe v. LaHue*, 460 U.S. 325, 345 (1983). Although a product of the common law, immunity for "acts within the judicial role" survived congressional enactment of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, now codified as 42 U.S.C. § 1983. *Pierson*, 386 U.S. at 554-55. *Cf. Tenney v. Brandhove*, 341 U.S. 367, *reh. denied*, 342 U.S. 843 (1951) (Section 1983

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[6] While the presence of a right of appeal may be helpful in identifying a particular act as protected by judicial immunity, the absence of such a right is not determinative of this issue. Certainly, the minor child in *Stump v. Sparkman*, 435 U.S. 349, *reh. denied*, 436 U.S. 951 (1978) (see discussion at 14, *infra*), who was never made a party to the proceeding, had no right to appeal from the judicial authorization of her sterilization. In fact, the only discussion of a right to appeal in the *Stump* majority opinion occurs in a footnoted response to the dissent's raising of this objection, 435 U.S. at 363 n.12; the Court simply pointed out that the absence of a right of appeal when a search warrant is issued, for example, does not destroy a judge's immunity for that act. And, as the Seventh Circuit aptly noted, the act of a judge sitting in a court of last resort would be no less judicial because of the absence of further review (A-12). *Forrester*, 792 F.2d at 653, *citing Moore v. Burger*, 655 F.2d 1265 (D.C. Cir. 1981).

does not abrogate common law immunity applicable to acts of state legislators).

The only question before this Court, therefore, is whether Judge White performed a judicial act generally within his jurisdiction in demoting and firing his probation officer. An affirmative answer to this question entitles him to an absolute immunity defense, even if there is no other recourse for a wrongfully discharged probation officer and despite the provisions of federal civil rights laws.[7] As the foregoing discussion has demonstrated, the need to immunize judges for all of their judicial acts is well recognized. *See Butz v. Economou*, 438 U.S. 478, 508-09, 511-12 (1978).

While this Court has never considered the applicability of judicial immunity to a judge's employment decision, Judge White will show that his challenged actions fairly meet the accepted criteria by which entitlement to this absolute defense is determined, and that a grant of immunity will similarly satisfy underlying policy considerations. The Seventh Circuit did not extend the concept of judicial immunity "further than its justification would warrant," *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982), but properly applied that immunity in order to effectuate its intended purposes. Allowance of the immunity defense

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[7] The fact that a plaintiff is precluded from maintaining an action for damages does not mean that a judge will be able to flout federal law with abandon. Judicial immunity would not bar his punishment under the criminal law for a willful deprivation of civil rights, *O'Shea v. Littleton*, 414 U.S. 488 (1974). Moreover, a judge's violation of federal law in the manner alleged in the present case could lead to disciplinary proceedings against him by the Illinois Courts Commission. *See* Ill. Rev. Stat. ch. 110A, ¶¶ 61, 62, 63, 71 (1986 Supp.). This Court has recognized that, despite immunity from § 1983 damage actions, official misconduct will not be undeterred or go unpunished. *Briscoe v. LaHue*, 460 U.S. 325, 345 n.32 (1983); *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976).

under the circumstances of this case promotes the same goals acknowledged in prior cases, preserving the integrity of the judicial decision-making process by protecting a judge's independent decisions as to the employment of persons whose duties are intimately connected with that process.

A. Judge White Acted Within The Scope Of His Jurisdiction In Demoting And Firing Ms. Forrester.

The question whether a judge acted generally within his jurisdiction, for purposes of the judicial immunity defense, must be decided on the basis of a broad construction of the scope of that jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356, *reh. denied*, 436 U.S. 951 (1978). A judge is entitled to this immunity even for judicial acts in excess of his jurisdiction; liability may be incurred only "[w]here there is clearly no jurisdiction over the subject matter," *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 351-52 (1872), so that an attempted exercise of judicial power is but an inexcusable usurpation of authority. *Id.* at 352.

"Jurisdiction," for immunity purposes, is not just a technical reference to the subject-matter jurisdiction which enables a judge to hear and decide a case. A finding as to jurisdiction does not turn on whether the conduct in question occurred in an adversarial or even a particularly formal setting. Thus, in *Stump*, the judge was entitled to absolute immunity for signing a sterilization petition presented to him *ex parte*, although the petition was not filed or docketed in court; was not the subject of notice to the minor or any hearing; was not made in conformity with any discernible statutory authority; and afforded no opportunity for appointment of a guardian *ad litem* for the girl or any eventual appeal on her behalf.

This Court has recognized that a court acts with jurisdiction when it admits or disbars an attorney, *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 354 (1872); *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 539-41 (1869), and when it exercises its authority to punish a perceived contempt by a non-litigant occurring outside the courtroom. *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972), *cited with approval in Stump*, 435 U.S. at 361. The Seventh Circuit accurately concluded that the jurisdictional aspect of an immunity claim is a test of the judge's general authority to engage in the conduct for which the immunity is being sought; to be entitled to an immunity defense, "the official's act must have been within the scope of his powers." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Judge Learned Hand explained in that case that:

> What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Id.

As previously discussed, the authority to appoint and remove such officers of the court as may be required to assist a judge in the performance of judicial duties, specifically including probation officers, has long been recognized in Illinois as an essential attribute of judicial power. *Witter v. County of Cook*, 256 Ill. 616, 624, 100 N.E. 148, 150 (1912). *Cf. State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N.E. 244 (1889); *In re Cooper*, 22 N.Y. 67 (1860). Consistently with the *Witter* holding, the Illinois statutes in effect at the time of plaintiff's termination provided that juvenile probation officers served at the pleasure of the chief judge, Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979),

and that adult probation officers were "removable in the discretion [of the court appointing them] by an order duly entered of record." Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979). This authority is analogous to that exercised by the Superior Court of Massachusetts in *Randall*, *supra*; an Illinois judge has jurisdiction to discharge a probation officer just as the Massachusetts statute established the jurisdiction of the court in *Randall* to remove an attorney from its bar.

In his capacity as the presiding judge of Jersey County, Judge White acted under the authority vested in him by the state constitution and the above statutory provisions when he demoted and fired his probation officer. It should, therefore, be concluded that his actions were not taken in the clear absence of jurisdiction, and that his assertion of judicial immunity was correctly held to survive plaintiff's challenge on this basis.

B. Judge White Performed Judicial Acts When He Demoted And Fired His Probation Officer.

In *Stump v. Sparkman*, 435 U.S. 349, 360, *reh. denied*, 436 U.S. 951 (1978), this Court recognized its first occasion to examine the "necessary attributes" of a judicial act in the context of a claim of judicial immunity. Rejecting positions that the characterization of an act as "judicial" depended upon the formality of the proceedings, *id.* at 360, or the presence of two contending litigants, *id.* at 363 n.12, the Court enumerated two broad factors which might be used to identify a particular act as a judicial one: "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and . . . the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.* at 362. The statement of these criteria was not intended to narrow the

scope of the immunity defense but to ensure its application in situations where a claim of immunity arises outside the most traditional litigation setting; the *Stump* Court emphasized that a judge need not be acting within the context of a "case" for his actions to merit this protection. *Id.* at 363 n.12. This Court subsequently reiterated its conclusion that "judicial privilege applies even to acts occurring outside 'the normal attributes of a judicial proceeding.' " *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982), *citing Stump*, 435 U.S. at 363 & n.12.[8]

1) The Nature Of The Act: Firing A Probation Officer Is A Function Normally Performed By A Judge.

When an order is entered against a party during the course of ongoing litigation, the nature of the act is easily identified as "judicial."[9] However, other activities plainly qualify for this characterization as well, when they flow from the inherent power of the judiciary or constitute an auxiliary but essential part of the judicial process.

For example, the earliest cases of this Court to address claims of judicial immunity held that the admission and removal of attorneys were judicial acts. *Randall v.*

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[8] Contrary to plaintiff's implication (Brief of Petitioner at 13-14), this Court's decision in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), did not limit the *Stump* test or even present any detailed analysis of the attributes of a judicial act. It rather adopted the observation of the dissenting district court judge that the Virginia Supreme Court had acted in a legislative capacity, not a judicial one, in promulgating disciplinary rules to govern members of the bar. *Id.* at 731. In view of that conclusion, of course, the second part of the *Stump* test could not be satisfied.

[9] Conversely, certain acts taken by a judge are fairly easily identified as non-judicial. *See, e.g., Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (physical assault by a judge is not a judicial act).

Brigham, 7 Wall. (74 U.S.) 523 (1869); *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872).[10] It has also been recognized that a judicial act is not confined to conduct occurring in a courtroom, *Lopez v. Vanderwater*, 620 F.2d 1229, 1234 & n.6 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980). The Seventh Circuit has held "docket management functions," such as delay in issuing a decision and interference with giving notice of a decision, to be judicial acts, *Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985), and the Fifth Circuit has described as judicial functions the appointment and supervision of court reporters to ensure timely production of reports of proceedings. *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *Slavin v. Curry*, 574 F.2d 1256, *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978). *See also Chocallo v. Bureau of Hearings & Appeals, SSA*, 548 F. Supp. 1349 (E.D. Pa. 1982), *aff'd*, 716 F.2d 889 (3d Cir.), *cert. denied*, 464 U.S. 983 (1983) (supervisory and case assignment functions of administrative law judges are judicial acts).[11] This Court has also extended immunity to prosecutors for their acts which are "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424

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[10] *See also Ex parte Secombe*, 19 How. (60 U.S.) 9, 15 (1857), where, although no question of immunity was presented, this Court stated that summary removal of an attorney from the bar was an "exercise of judicial authority" within the jurisdiction of the court.

[11] Also, in *Martinez v. Winner*, 771 F.2d 424, *modified on other grounds*, 778 F.2d 554 (10th Cir. 1985), *vacated sub nom. Tyus v. Martinez*, ____ U.S. ____, 106 S. Ct. 1787 (1986), *vacated as moot*, 800 F.2d 230 (10th Cir. 1986), the court found a judge's assignment of cases, provisions for courtroom security, and communication with the news media to be judicial acts, explaining that an act might be described as administrative or ministerial for some purposes, while still qualifying as a judicial act under immunity law principles. 771 F.2d at 434. The court's reasoning in that opinion is instructive, even if its decision has no precedential value.

U.S. 409, 430 (1976); to witnesses, *Briscoe v. LaHue*, 460 U.S. 325 (1983); and to administrative law judges and agency employees performing prosecutorial tasks. *Butz v. Economou*, 438 U.S. 478 (1978).

The Seventh Circuit properly relied upon the role of a probation officer to conclude that a judge, whose judicial work product in sentencing matters is based to a significant degree upon the contributions of a probation officer acting on his behalf, performs judicial acts in controlling the quality of his own decisions by regulating the working relationship between himself and that member of his staff. As previously discussed, the duties of a probation officer, in Illinois and elsewhere, include tasks which are widely acknowledged to be an integral part of the work of the judiciary. In fact, on this basis several courts have held that probation officers themselves are entitled to absolute, quasi-judicial immunity, when their duties include direct input to the sentencing functions of a judge so as to be intimately related to the judicial process. *Tripati v. United States Immigration & Naturalization Services*, 784 F.2d 345 (10th Cir. 1986); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1986); *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979). Because of the high degree of trust and confidence which must be placed in this type of court official, the employment of a probation officer in Illinois is normally performed by a judge. *Stump*, 435 U.S. at 362.

2) The Expectations Of The Parties: A Probation Officer Deals With A Judge In His Judicial Capacity.

The second element of the *Stump* "judicial act" test is also met, because a probation officer such as plaintiff deals with the judge in his judicial capacity. This Court is urged to recognize that no bright line can fairly be drawn be-

tween acts which are "judicial," "ministerial," or "administrative," for purposes of deciding whether a judge is entitled to absolute immunity for executing a particular duty.

The designation of an act as "ministerial," and hence not entitled to the protection of judicial immunity, stems from this Court's decision in *Ex parte Virginia*, 100 U.S. 339 (1880), which involved a criminal prosecution against a judge for his alleged violation of the Civil Rights Act of 1875 in selecting jurors. However, the Court assumed in that case that the act of selecting jurors was a ministerial one (see, *Pulliam v. Allen*, 466 U.S. 522, 541 n.21 (1984)), because it could be and often was performed by someone other than a judge, 100 U.S. at 348, but decided that the judge was not entitled to immunity whether the act was ministerial or judicial. *Id.*

In a strongly worded dissent to the *Ex parte Virginia* decision, Justice Field, the author of the Court's two prior opinions on judicial immunity, argued that the selection of jurors was indeed a judicial act. *Id.* at 359-60 (Field, J., dissenting). *See also* Biddle, *Liability of Officers Acting in a Judicial Capacity*, 15 American Law Review 427, 432, 435-36 (July 1881), where the author explained that the common law did not distinguish between a judge's ministerial and discretionary acts for purposes of judicial immunity and criticized the Court's decision in *Ex parte Virginia*. The decision in *Taaffe v. Downes*, set forth in note (a) of *Calder v. Halket*, 3 Moore, P.C. 28, 36 (1840), further demonstrated that, at common law, an act which might be ministerial if performed by someone other than a judge could nonetheless be protected by judicial immunity when performed by a judge. *Id.* at 44. As this Court's judicial immunity decisions have been informed by the common-law origins of the doctrine, *see, e.g., Pulliam v.*

Allen, 466 U.S. 522 (1984), it should recognize that blanket designations of types of acts as "ministerial" will not necessarily be useful in determining whether the actor should be protected by judicial immunity.

The rote use of labels such as "ministerial" or "administrative" to exclude certain functions from qualifying as judicial acts for immunity purposes can oversimplify the necessary analysis. The interrelationship of administrative and judicial functions was effectively addressed in a recent opinion by the Ninth Circuit, with particular reference to the decision now before this Court. In *Crooks v. Maynard*, No. 86-3629 (9th Cir. June 24, 1987), Judge Sneed observed that the distinction between "administrative" and "judicial" acts:

> ignores the reality of present day judging. . . . [D]irection of a court's staff in a manner designed to improve overall judicial performance frequently is as important as remaining on the bench longer hours, in-chambers conferencing with attorneys, or producing more and better opinions. If the purpose of absolute immunity is, as Judge Posner suggests in his dissent in Forrester, to protect judges "from being seriously deflected from the effective performance of their duties," *id.* at 660, it must be recognized that today's judge administers as he judges and that the sharp line that can be drawn between a judicial act, such as ruling on the admission of evidence, and managing court or chambers personnel, is useless in fixing the limits of judicial immunity.

Id., slip op. at 8-9.

Rather than draw such a "sharp line," the Seventh Circuit analyzed Judge White's decisions in terms of their particular relationship to the goal of fearless and independent judicial decision-making. Personnel decisions may perhaps be only "administrative" or "ministerial" to the

extent which a judge, in supervising a courthouse as a place of business, may be obliged to ensure that clerical and maintenance personnel are provided. The functions of those employees are not unique to the performance of judicial acts, and the relationship between a judge and a typist, or a judge and a janitor, is not unlike that of any private or governmental employer and employee. Such an employee may not deal with the judge "in his judicial capacity," within the meaning of *Stump*; the employee's performance does not constitute a judicial act; and the hiring and firing of such an individual could be performed by someone having no direct connection with the judge, without substantively altering the quality or manner of his decision-making. However, a probation officer's duties and entire employment relationship exist by virtue of that employee's service to the judge *qua* judge, *see Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983), and the ability to control the employment of the former will directly affect the quality of the latter's dispositions in criminal and juvenile cases.[12] Therefore, the discharge of a probation officer constitutes a judicial act according to the tests announced by this Court in *Stump*.

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[12] In *Doe v. County of Lake*, 399 F. Supp. 553 (N.D. Ind. 1975), the district court refused a claim of judicial immunity, based, in part, upon its determination of the ministerial or administrative nature of the responsibilities at issue. However, the court did not just apply these terms without analysis, but observed that evaluation of the activities complained of, and the implementation of any relief, would not "impair, interfere [with] or otherwise affect the discretion required by [the judges] in making case-by-case decisions on the merits of individual juvenile situations." *Id.* at 557-58.

C. Allowance Of Judicial Immunity With Respect To This Type Of Employment Decision Is Consistent With The Underlying Purpose Of This Defense.

The law realistically does not expect a judge to be oblivious to his own personal interests; the defense of judicial immunity recognizes the need to prevent judges from having to choose between risking themselves or abdicating their judicial responsibilities. *See, e.g., Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872). If a judge must weigh a decision to hire or fire a probation officer against his potential financial exposure in a lawsuit brought by every disappointed applicant or disgruntled former employee, he may become more inclined to accept inferior performance of duties which are an integral part of his sentencing functions.

Last year, while the federal courts experienced an overall decline in civil filings for the first time since 1977, the number of new civil rights employment suits increased by fourteen percent during the same period. 1986 Annual Report of the Director of the Administrative Office of the United States Courts 8-10. Judges throughout the country are presumably aware of this trend and may opt for self-protection, even at the expense of the quality of their performance of sentencing functions. This is precisely the sort of consequence that judicial immunity exists to prevent.

Furthermore, a judge might be understandably reluctant to see a jury or even another tribunal "second-guess" his discretionary sentencing judgments, in order to determine whether the quality of a probation officer's work was the genuine reason for the discharge of that employee. Disagreements as to the sufficiency of information upon which he has relied in his sentencing decisions may do incalculable harm to his reputation and may lead to at-

tempted collateral attacks on those sentences, as well as further actions against the judge by affected defendants.[13]

This Court has explained that it will not "draw functional lines finer than history and reason would support." *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982). It should now decline to draw a line between strict "acts of adjudication" and other decisions of a judge which directly affect his adjudicatory functions. To focus only on the act of hiring or firing, as plaintiff asks this Court to do, without reference to the duties to be performed by the employee, the relationship of those duties to the adjudicatory process, or the reasons why a particular personnel decision rests with a particular official, is to disregard the ever-increasing need to delegate judicial functions, while ensuring that these delegated functions are performed in a manner consistent with the highest goals of independent decision-making. Judicial immunity is necessary to protect "the special nature of [judges'] responsibilities," *Butz v. Economou*, 438 U.S. 478, 511 (1978), and should not be denied because the decisions of Judge White were not the specific type which have previously been recognized as judicial acts in the rulings of this Court.[14]

As the Seventh Circuit noted, the courts have been divided in their rulings regarding immunity for employment-related decisions of judges. Lower courts which have granted immunity under circumstances similar to those of the case at bar, or acknowledged the possibility of such a grant, have generally based their conclusions

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[13] Plaintiff's belief that "a judge has nothing to fear" (Brief of Petitioner at 17) from the institution of such litigation overlooks this Court's decision in *Pulliam v. Allen*, 466 U.S. 522 (1984). *See*, Weisberger, *The Twilight of Judicial Independence—Pulliam v. Allen*, 19 Suffolk University Law Review 537 (Fall 1985).

[14] The decisions are, however, similar to those protected in *Randall v. Brigham*, 7 Wall. (74 U.S.) 523 (1869), and *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872), as previously discussed.

on the need to protect the integrity of the decision-making process. *See, e.g., Forrester v. White*, 792 F.2d 647 (7th Cir. 1986); *cert. granted*, ____ U.S. ____, 107 S. Ct. 1282 (1987); *Laskowski v. Mears*, 600 F. Supp. 1568 (N.D. Ind. 1985); *Mason v. Twenty-Sixth Judicial District of Kansas*, No. 86-2103-S (D. Kan. April 8, 1987); *Pruitt v. Kimbrough*, 536 F. Supp. 764 (N.D. Ind. 1982), *aff'd*, 705 F.2d 462 (7th Cir. 1983); *Blackwell v. Cook*, 570 F. Supp. 474 (N.D. Ind. 1983). *See also, Cronovich v. Dunn*, 573 F. Supp. 1340 (E.D. Mich. 1983) (finding that the scope of judicial immunity for personnel decisions is unclear).

Certainly, the question is not an insubstantial one, *cf. Davis v. Passman*, 442 U.S. 228, 251 (1979) (Stewart, J., dissenting), yet those cases denying immunity for employment decisions often fail to consider the employees' participation in the judicial acts of their employer judges. For example, in *Shore v. Howard*, 414 F. Supp. 379 (N.D. Tex. 1976), plaintiffs, who had been employed as adult probation volunteer coordinators, responsible for recruiting, training and supervising volunteer probation officers, were fired by the director of the county adult probation office. Plaintiffs alleged that these discharges were in violation of their civil rights, relying in particular on the provisions of local civil service laws. The district court ruled, first, that judicial immunity would not protect the local judges (who were found to be necessary parties defendant) from an action for equitable relief, and then, quoting *Ex parte Virginia*, 100 U.S. 339, 348 (1880), summarily concluded that the rhetorical question posed in that case "clearly dispose[d] of the claim of judicial immunity in regard to the employment and dismissal of employees within the context of civil rights actions." 414 F. Supp. at 386.[15]

[15] The rhetorical question was whether the election or appointment of "court-criers, tipstaves, sheriffs, & c." was a judicial act. (See discussion *supra* at 20, regarding *Ex parte Virginia*).

Not only did the *Shore* Court fail to explain why the hiring of probation officers could be performed by private persons, as was said to be true for jurors in *Ex parte Virginia*, but it immediately retreated from the potential scope of its conclusion by noting that judicial officers might not always be liable in damages for the employment or dismissal of employees. 414 F. Supp. at 386 n.3.[16] After expressly declining to reach the question of a judge's liability for monetary relief under such circumstances, *id.*, the court went on to dismiss the plaintiffs' action on the merits, finding that they were not "employees" under the County Civil Service Act, and were not entitled to civil service protections, because judicial

[16] Other decisions have displayed only brief consideration of this issue. In *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983), the court observed in a single sentence analysis, based upon the particular facts of that case, that the plaintiff did not deal with the judge in his judicial capacity and, therefore, one of the *Stump* factors could not be met. In *Goodwin v. Circuit Court*, 729 F.2d 541 (8th Cir. 1984), the individual judge initially raised a claim of good faith immunity. *Id.* at 545-46. A claim of judicial immunity in connection with the transfer of a hearing officer to the position of a staff attorney was summarily rejected with the conclusion that this transfer was an administrative personnel decision, citing only the *Marafino* decision in support of this conclusion. *Id.* at 549. In *Retail Clerks International Association v. Leonard*, 450 F. Supp. 663 (E.D. Pa. 1978), plaintiffs were employees of the register of wills, who was described as a judicial officer with judicial duties involving the probate of wills. The job descriptions of the plaintiff employees were never discussed in the court's decision, which summarily concluded that the hiring and firing of employees was not within the purview of the register's judicial duties. In *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981), a statute gave the county judge the "executive power" to hire county employees, and required him to be bonded in the exercise of this duty. On the basis of this statutory language, the district court concluded that the hiring and firing of county employees was not a judicial act; otherwise, the bond requirement would be meaningless. *Id.* at 1303.

"responsibility for the supervision of probationers includes these facets of employment and dismissal of probation officers." *Id.* at 396.

Two recent cases have rejected judicial immunity defenses with reference to the particular roles of the plaintiffs and their relationship with their former employers. In *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.) *cert. denied*, ____ U.S. ____, 107 S. Ct. 574 (1986), decided five days after *Forrester*, the court of appeals denied a judge's claim of immunity in his former court reporter's action alleging that she had been discharged because of her race and political affiliations. The court did not reject either the holding or rationale of *Forrester*, but found that McMillan did not share the same working relationship with the judge as was apparent in the former case, and that the judge's decision-making ability was not implicated by his discharge of the court reporter. 793 F.2d at 152. Explaining that a judge should not be able to invoke the immunity defense when his complained-of acts "do not involve the judicial process so that fear exists that freedom of judicial decisionmaking may be stifled," *id.* at 154, the court found no connection between this personnel action and the decision-making process which would justify allowance of this defense. The *McMillan* decision provided the rationale for the Sixth Circuit's opinion in *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), which refused a claim of immunity by a bankruptcy judge who had allegedly fired his personal secretary in violation of her First Amendment right of free speech.

These latter decisions are not inconsistent with the case at bar, but rather underscore its narrow scope. The *Forrester* Court only addressed a personnel action involving an employee whose direct participation in the decision-making process was a fundamental aspect of her employ-

ment relationship with her employer-judge; to implement the court's holding in other cases, it will be necessary to examine the nature of an employee's role in the judicial system. The required evaluation will surely not, however, be so burdensome as plaintiff suggests, because few categories of employees are likely to participate directly in the formulation of a judge's decisions. If the scope of the employee's duties is genuinely unclear, those duties may be ascertained through limited discovery as well as consultation of statutes or regulations controlling his or her job performance. As was true in the case at bar, the immunity issue can be resolved without engaging in a full trial of the merits of a plaintiff's claim.

The reasoning of the Seventh Circuit fosters the fundamental policies underlying the doctrine of judicial immunity and provides a fair, workable test which will give reasonable guidelines to judges, the legally sophisticated class of defendants affected by it. It should be adopted by this Court.

D. Employment Decisions Considered By The Courts In Connection With Other Immunities Provide Guidelines For The Resolution Of This Case.

This Court has often drawn analogies between the application of judicial immunity and application of other absolute immunities, such as those allowed for legislators acting in their legislative capacity and the President acting in his executive capacity. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 751-52 (1982); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Barr v. Mateo*, 360 U.S. 564, 575 (1959). In addressing claims of immunity for employment decisions made by legislators, lower courts have performed analyses similar to that of the Seventh Circuit in the case at bar. The reasoning of these decisions is sound

and merits attention in resolving the analogous question presently before this Court.[17]

Debate over the nature and extent of a "legislative act" offers a number of parallels to the analysis which must be performed in cases of judicial immunity claims. As a general proposition, legislators are protected from liability when "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376, *reh. denied*, 342 U.S. 843 (1951). The purpose of this immunity is not for the personal benefit of a Member of Congress, but to protect the integrity of the legislative process. *United States v. Brewster*, 408 U.S. 501, 507 (1972). Legislative immunity applies to acts which are an "integral part" of the legislative process and protects a legislative aide to the extent that his actions would be immune if performed by the Member who employs him. *Gravel v. United States*, 408 U.S. 606, 621-22, 625, *reh. denied*, 409 U.S. 902 (1972).

In *Davis v. Passman*, 442 U.S. 228 (1979), this Court declined to decide whether that immunity protected Congressman Davis from a civil action for damages brought against him by a former staff member who alleged that her termination had been due to unlawful sex discrimina-

[17] Although it has not decided whether legislative or judicial immunity protects an actor for the hiring or firing of subordinates, this Court has extended the defense of absolute immunity to an employment decision made by the President of the United States. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the former president was held absolutely immune from liability for damages in connection with the discharge of an air force employee, because the discharge was found to be within the outer perimeters of official executive duties. Of particular note is the *Nixon* Court's method of distinguishing the presidency from those governmental officials having only qualified immunity, by analogizing the duties of the chief federal executive to the "especially sensitive duties" of certain other public officials who are entitled to absolute immunity under well-settled law, such as judges and prosecutors. *Id.* at 746.

tion. *Id.* at 235 n.11.[18] The issue of legislative immunity for employment decisions was, however, subsequently addressed by the First and District of Columbia Circuit Courts.[19] In *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984), the plaintiff's lawsuit alleged civil rights violations in the denial of his application for employment as a press officer for the Puerto Rico House of Representatives. Acknowledging the link between the performance of protected duties and the employment of people to perform those duties, the court held: "[t]o the extent that an employee's function is 'essential' to the legislative process, his qualifications, and, hence, his proper selection, should be correspondingly essential." 738 F.2d at 59. While cautioning that every employment relationship would not implicate legislative interests, it recognized that those employees whose duties were to deal with the legislative process were "of direct legislative importance," citing the *Gravel* Court's observation that:

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[18] Upon its initial consideration of this case, the Fifth Circuit had decided that the Speech or Debate Clause did not protect a Member of Congress from a discrimination suit brought by a discharged employee. *Davis v. Passman*, 544 F.2d 865, 880-81 (5th Cir. 1977). That decision was reversed on other grounds on rehearing en banc, with Judge Jones, in a concurring opinion, observing that "the hiring and firing of [a Congressman's] 'alter ego' is a legislative activity and a part of the exercise of the legislative power." 571 F.2d 793, 802 (Jones, J., concurring).

[19] A claim of legislative immunity from damages was also allowed in connection with an employment decision in *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973). Other subsequent opinions allowing legislative immunity for personnel actions include *Birdsong v. Dirck*, 633 F. Supp. 54 (E.D. Mo. 1984), and *Bostick v. Rappleyea*, 629 F. Supp. 1328 (N.D.N.Y. 1985). *See also Hudson v. Burke*, 617 F. Supp. 1501 (N.D. Ill. 1985) (legislator is immune for decisions to hire or fire aides who have the opportunity for meaningful input into the legislative process).

> "[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos. . . ."

Id. at 60, *citing Gravel*, 408 U.S. at 616-17. Therefore, legislative immunity for employment decisions as to "alter egos" of state legislators was deemed appropriate.[20]

Two decisions of the District of Columbia Circuit followed the same analytical path, first to deny, and later to grant, a claim of legislative immunity in suits brought by former congressional employees. In *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984), the court rejected a contention that the Speech or Debate Clause provided a defense to a civil rights action brought by the discharged manager of the House of Representatives' restaurants, finding such a personnel action "too remote from the business of legislating" to merit such protection. 733 F.2d at 928. Two years later, in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, *reh. denied*, 793 F.2d 380 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 107 S. Ct. 601 (1986), the court found that the Speech or Debate Clause did shield the defendant Members of Congress in connection with the discharge of the first black Official Reporter of the House, who alleged that her dismissal was the result of racial discrimination.

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[20] Although the Speech or Debate Clause provides a constitutional foundation for the immunity applicable to Members of Congress, similarly expansive protection has been applied, as a matter of common law, to state legislators. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, *reh. denied*, 342 U.S. 843 (1951).

Citing *Agromayor, supra*, the *Browning* Court explained that:

> Personnel decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative process. Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions," personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

789 F.2d at 928-29 (citation omitted). Concluding that the plaintiff's duties as Official Reporter were directly related to the legislative process, the court held that the decision to terminate her employment was protected by legislative immunity.

The *Browning* Court explained that it would not extend this immunity to matters only remotely connected with the legislative process, although it concluded that immunity should not be restricted to situations in which the employee had discretionary duties with respect to legislative acts. In the case at bar, plaintiff did have discretionary input into Judge White's judicial functions, and, therefore, the judge's immunity claim need be analyzed only with respect to a more narrow range of employees. The *Agromayor*, *Walker* and *Browning* decisions nonetheless provide a useful discussion of functions which are "integral" to the legislative process and support, on that basis, the analogous evaluation of judicial functions which should be undertaken in this case.

CONCLUSION

The respondent, Judge Howard Lee White, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit finding that he is entitled to absolute immunity for alleged sex-based discrimination in connection with the discharge of petitioner, his former probation officer.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois

100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Attorneys for Respondent

ROSALYN B. KAPLAN *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2130

Of Counsel

* Counsel of Record

APPENDIX

STATUTES INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979)

706-1. Probation departments—Functions and duties

§ 6-1. Probation departments—Functions and duties. (1) The chief judge of each circuit shall make provision for probation services for each county in his circuit.

(2) Every county or every group of counties constituting a probation district shall maintain a Probation Department, which shall be under the authority and supervision of the chief judge of the circuit or of some other judge designated by him. For the purposes of this Act such a Probation Department has, but is not limited to, the following powers and duties:

(a) To receive, investigate and evaluate complaints indicating delinquency, behavior otherwise requiring supervision, neglect or dependency, within the meaning of Sections 2-2 through 2-5;[1] to determine or assist the complainant in determining whether a petition should be filed under Section 4-1[2] or whether referral to an agency, association or other person or whether some other action is advisable;

and to see that the indicating filing, referral or other action is accomplished.

(b) When a petition is filed under Section 4-1, to make pre-hearing investigations and formulate recommendations to the court.

(c) To counsel and, by order of court, to supervise minors referred to the court; to conduct indicated programs of casework, including referrals for medical and mental health service, organized recreation and job placement for wards of the court and, when appropriate, for members of the family of a ward; to act as liaison officer between the court and agencies or associations to which minors are referred or through which they are placed; when so appointed, to serve as guardian of the person of a ward of the court; to provide probation supervision and protective supervision ordered by the court; and to provide like services to wards and probationers of courts in other counties or jurisdictions who have lawfully become local residents.

(d) To arrange for placements pursuant to court order.

(e) To assume administrative responsibility for such detention, shelter care and other institutions for minors as the court may operate.

(f) To maintain an adequate system of case records, statistical records, and financial records related to juvenile detention and shelter care and to make reports to the court and other authorized persons, and to other governmental bodies lawfully requiring them.

(g) To perform such other services as may be appropriate to effectuate the purposes of this Act or as may be directed by any order of court made under this Act.

(3) The Probation Department in any probation district or county having less than 1,000,000 inhabitants, or any personnel of the Department, may be required by the circuit court to render services to the court in other matters as well as proceedings under this Act.

(4) In any county or probation district, such a Probation Department may be established as a separate division of

a more inclusive department of court services, with any appropriate divisional designation. The organization of any such department of court services and the appointment of officers and other personnel must comply with Section 6-5.[3]

Amended by P.A. 81-469, § 2, eff. Jan. 1, 1980.

[1] Paragraphs 702-2 through 702-5 of this chapter.
[2] Paragraph 704-1 of this chapter.
[3] Paragraph 706-5 of this chapter.

Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979)

706-5. Personnel of Probation and Court Services Departments

§ 6-5. Personnel of Probation and Court Services Departments. (1) The chief judge of the circuit shall appoint a Director of each Probation Department in the circuit and may appoint one or more assistant directors and probation officers, who, wherever possible, have had experience in the field of family or child welfare or special education in such field or fields, to serve at his pleasure or he may authorize the Director to appoint such assistant directors as well as probations [sic] officers and other personnel of the Department as the chief judge from time to time may determine are needed, to serve at the pleasure of the chief judge. The Director, who may also be the chief probation officer, shall have general charge of the Department under the supervision of the chief judge or of some other judge designated by the chief judge for that purpose.

(2) The chief judge of the circuit shall appoint a Director of any Court Services Department therein and may appoint one or more assistant directors, to serve at his pleasure, or he may authorize the Director to appoint such assistant directors as well as probation officers and other personnel of the Department as the chief judge from time to time may determine are needed, to serve at the pleasure of the chief judge. Appointments to any position in the Court Services Department must be made in accordance with standards prescribed by the chief judge in consultation

with an advisory committee on personnel of his selection, composed of persons of recognized and outstanding ability in the teaching or practice of social service and public welfare work or in the practice of psychiatry, psychology, internal medicine or pediatrics. The Director shall have general charge of the Department under the supervision of the chief judge or of some other judge designated by the chief judge for that purpose.

(3) The Supreme Court shall provide by order or rule that the Conference of Chief Circuit Judges convene to establish permissive state-wide minimum qualifications or criteria for directors and assistant directors of Probation or Court Services Departments and for probation officers and other social service personnel employed for purposes of this Act. After such minimum qualifications or criteria have been adopted by the Conference of Chief Circuit Judges and filed with the Supreme Court, appointments or reappointments of personnel may be made in accordance therewith by or by authority of the respective chief circuit judges. In addition, the Supreme Court may, in accordance with recommendations of the Conference of Chief Circuit Judges, provide for (a) consultative services, (b) assistance in the development of probation services, and (c) assistance in arranging programs of training and staff development for probation officers to Probation or Court Services Departments established under this Act.

Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979)

204-1. Probation officers—Qualifications—Appointment, etc.

§ 9. The circuit court of each of the several counties in this State may appoint a probation officer to act as such for and throughout the county to which he shall be appointed. The circuit court of any county may appoint such number of additional probation officers for such county as the court may deem to be necessary or advisable. Any circuit court may also, in its discretion, appoint a chief probation officer, deputy chief probation officers, and supervisors, in addition to the number of probation officers

appointed. The Circuit Judges in any of the circuits in this State, except the judicial circuit of the County of Cook, may, in their discretion, in lieu of appointing a probation officer for each or any county in such circuit, appoint a probation officer to act for and throughout the circuit in which he may be appointed, or establish a probation district of 2 or more counties within the circuit, if such district would have a population of not less than 25,000 nor more than 100,000 inhabitants as determined by the school census preceding the establishment of such district, and appoint, immediately after such establishment, a probation officer and such number of additional probation officers for such circuit as the Circuit Judges may deem to be necessary or advisable, one of whom shall be the chief, to act for and throughout such district. Probation officers shall be of good character, shall possess such other qualifications as may be provided by rules to be adopted by such courts respectively, and may by such rules each be required to give bond in a sum not exceeding $5,000, conditioned for the faithful discharge of the duties of such probation officer, and otherwise as provided by the rules such bond to be with such sureties as may be approved by the court. The probation officers shall serve as such from the date of their appointment, shall be subject to the orders of the courts appointing them, and removable in the discretion thereof by an order duly entered of record. The circuit court may adopt general rules not inconsistent with the provisions of this Act, and promotive of its letter and spirit, providing, among other things for the qualifications of probation officers, their duties, and such other matters as may seem expedient.

The judges of the circuit court of any county shall meet as a unit body, at such times as they deem proper, and at any such meeting may appoint a chief probation officer to act as such over all the probation officers appointed by any of such courts. The judges may at any such meeting, adopt general rules not inconsistent with the provisions of this Act, but promotive of its letter and spirit and transact such other business concerning the subject matter of this Act as to such judges may seem proper.

The judges may, at any such meeting appoint a committee of such number of them as they may determine to exercise the ministerial powers of the entire body of judges and the powers of appointment and removal of the chief probation officer, such committee to report to the entire body of judges at such time as may be required by rules or by specific order.

Amended by P.A. 79-1138, § 1, eff. July 1, 1976.

Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979)

204-4. Probation officers—Duties

§ 12. The duties of probation officers shall be:

(1) To investigate as required by section 3 of this act,[1] the case of any person to be placed on probation. Full opportunity shall be afforded a probation officer to confer with the person under investigation when such person is in custody.

(2) To notify the court of any previous conviction for crime or previous probation of any defendant invoking the provisions of this act.

(3) All reports and notifications required in this Act to be made by probation officers shall be in writing and shall be filed by the clerk in the respective cases.

(4) To preserve complete and accurate records of cases investigated, including a description of the person investigated, the action of the court with respect to his case and his probation, the subsequent history of such person, if he becomes a probationer, during the continuance of his probation, which records shall be open to inspection by any judge or by any probation officer pursuant to order of court, but shall not be a public record, and its contents shall not be divulged otherwise than as above provided, except upon order of court.

(5) To take charge of and watch over all persons placed on probation under such regulations and for such terms as may be prescribed by the court, and giving to each

probationer full instructions as to the terms of his release upon probation and requiring from him such periodical reports as shall keep the officer informed as to his conduct.

(6) To develop and operate programs of reasonable public service work for any persons placed on probation or supervision, providing, however, that no probation officer or any employee of a probation office acting in the course of his official duties shall be liable for any tortious acts of any person placed on probation or supervision as a condition of probation or supervision, except for wilful misconduct or gross negligence on the part of the probation officer or employee.

No person assigned to a public service employment program shall be considered an employee for any purpose, nor shall the county board be obligated to provide any compensation to such person.

(7) When any person on probation removes from the county where his offense was committed, it shall be the duty of the officer under whose care he was placed to report the facts to the probation officer in the county to which the probationer has removed; and it shall thereupon become the duty of such probation officer to take charge of and watch over said probationer the same as if the case originated in that county; and for that purpose he shall have the same power and authority over said probationer as if he had been originally placed in said officer's charge; and such officer shall be required to report in writing once a month the results of his supervision to the probation officer in whose charge the said probationer was originally placed by the court.

(8) To perform such other duties as are provided for in this act or by rules of court and such incidental duties as may be implied from those expressly required.

Amended by P.A. 80-710, § 2, eff. Oct. 1, 1977.

[1] Paragraph 786 (repealed) of this chapter.

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-761

In The

Supreme Court of the United States

October Term, 1987

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

REPLY BRIEF OF PETITIONER

MARY ANNE SEDEY
(Counsel of Record)
2256 South Grand Boulevard
St. Louis, Missouri 63104
(314) 773-3566

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

ARGUMENT

I. THE GOAL OF EFFICIENT ADMINISTRATION OF THE JUDICIAL SYSTEM DOES NOT JUSTIFY EXPANDING THE DOCTRINE OF JUDICIAL IMMUNITY. 1

II. RECENT DECISIONS OF THE COURTS OF APPEALS SIGNAL UNWARRANTED EXPANSION OF THE DOCTRINE OF JUDICIAL IMMUNITY. 3

AUTHORITIES CITED

Page

CASES:

Crooks v. Maynard, 820 F.2d 329 (9th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3166 (U.S. Aug. 21, 1987) 4, 5

Frontiero v. Richardson, 411 U.S. 677 (1973) 3

Guerico v. Brody, 814 F.2d 1115 (6th Cir. 1987) 4

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 2

McMillan v. Svetanoff, 739 F.2d 149 (7th Cir.), *cert. denied*, — U.S. —, 107 S. Ct. 574 (1986) 4

Ohse v. Hughes, 816 F.2d 1144 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3195 (U.S. Sept. 8, 1987) 4, 5

OTHER AUTHORITIES:

An Argument Against Judicial Immunity for Employment Decisions, 11 Nova L.Rev. 1127 (1987) 3

Forrester v. White: Personal Consequences of Personnel Decisions: Extending Judicial Immunity to Employment Discrimination by Judges, 71 Minn. L.Rev. 1068 (1987) 3

Immunity Doctrines and Employment Decisions of Judges, 55 Fordham L.Rev. 621 (1987) 3

ARGUMENT

I. THE GOAL OF EFFICIENT ADMINISTRATION OF THE JUDICIAL SYSTEM DOES NOT JUSTIFY EXPANDING THE DOCTRINE OF JUDICIAL IMMUNITY.

Although the positions of the parties in this matter diverge significantly in many respects, both Petitioner and Respondent agree with the proposition articulated by the Seventh Circuit in its opinion in this matter, at A-7, that the scope of the doctrine of judicial immunity is inherently limited by the policy considerations which justify it. The opinion of the Court of Appeals, at A-7, and the briefs of Respondent, at 4, and of the Amicus, at 7, acknowledge that the major policy consideration underlying the doctrine is the public interest in principled, independent judicial decision-making. However, despite giving lip service to this proposition, the Seventh Circuit's justification for its ruling is based primarily on policy considerations outside the traditional justification for the imposition of the doctrine.

The Seventh Circuit declares that judicial immunity is "needed to promote the effective administration of our legal system." (A-21) Respondent justifies the imposition of the doctrine by the modern judge's need to control his working relationship with staff members, upon whom he must rely for skill, discretion and integrity. (Brief of Respondent, 10-11) The Illinois Judges Association urges the Court to apply the doctrine of judicial immunity to assure that judges are able to carry out their judicial functions "efficiently and independently," working only with probation officers in whom they have "total trust." (Brief of Amicus Curiae, 4)

While good working relationships with reliable judicial staff members and efficient administration of the judicial system are laudable goals, they are not the goals which the doctrine of judicial immunity was designed to accomplish. Throughout its history, the doctrine's protection has been extended only to those situations where it is *essential* to assure principled, independent judicial decision-making and to shield judgments from collateral attack. (See Brief of Petitioner, 10-12) It is the threat of lawsuits against judges by disgruntled litigants, a problem unique to judges because of their role in dispute resolution, which impedes the accomplishment of these goals.

Moreover, the goal of efficient judicial administration and desire for competent judicial staff members are not advanced by the extension of the doctrine of judicial immunity. The availability of a cause of action against judges for employment discrimination neither threatens a judge's ability to maintain good working relationships with competent, trustworthy staff members, nor impairs the efficient functioning of a court system. In fact, personnel decisions based on characteristics like sex and race, rather than careful examination of the skills and attributes of the individual employee, pose a greater threat to the efficient, productive operation of any enterprise, public or private. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

As the Second Circuit correctly acknowledges, there is an inherent tension between the imposition of the doctrine of judicial immunity and the constitutional rights of judicial employees. (A-9) Although "some instances of injustice" may be justified by the important objective of promoting principled, independent judicial decision-

making, the denial of constitutional rights is rarely justified by considerations of efficiency. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973). Even if it could be argued that the goal of efficient and effective judicial administration could be advanced by barring employment discrimination suits against judges, that objective must be weighed against the injustice caused by stripping employees of the remedy for violation of important constitutional rights. If such considerations are used to justify the expansion of the doctrine of judicial immunity to bar employment discrimination suits against judges by even some judicial employees, there is great potential for expansion of the doctrine beyond its traditional parameters. One commentator has cautioned that "the doctrine may be a house of cards" which could easily topple once its narrowly drawn historical limits are crossed.[1]

II. RECENT DECISIONS OF THE COURTS OF APPEALS SIGNAL UNWARRANTED EXPANSION OF THE DOCTRINE OF JUDICIAL IMMUNITY.

Two recent decisions of the U.S. Courts of Appeals underscore the potential for unwarranted expansion of the

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1. Note, *An Argument Against Judicial Immunity for Employment Decisions,* 11 Nova L.Rev. 1127, 1147 (1987). The Seventh Circuit's decision in the instant case has been severely criticized in two other scholarly articles published since its issuance. *Forrester v. White: Personal Consequences of Personnel Decisions: Extending Judicial Immunity to Employment Discrimination by Judges,* 71 Minn. L.Rev. 1068 (1987); *Immunity Doctrines and Employment Decisions of Judges,* 55 Fordham L.Rev. 621 (1987).

doctrine.[2] In *Crooks v. Maynard*, 820 F.2d 329 (9th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3166 (U.S. Aug. 21, 1987) (No. 87-299), the Ninth Circuit rules that although a line can be drawn between judicial and administrative acts, such a distinction "ignores the reality of present day judging," 820 F.2d at 332, and is "useless in fixing the limits of judicial immunity." 820 F.2d at 329. Misstating the common law rule, the court holds that judges are immune from damage liability for acts performed in their *official* capacities, 820 F.2d at 331-332, and rules that the judge in question "acted in a judicial capacity when he entered and sought to enforce an order that, while directed at what might be perceived to be an administrative problem, was within his power to enter." 820 F.2d at 333. It should be noted that the plaintiffs in the *Crooks* case were court clerks, clearly not the kind of judicial employees who provide information and advice to judges.

James Ohse, the plaintiff, in *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3195 (U.S. Sept. 8, 1987) (No. 87-413), was an adult probation officer in an Illinois county who brought an employment discrimination action against three judges who made the final decision to terminate his employment. The Seventh Circuit opinion in the case states explicitly that his job required "no personal or professional interaction" between him and the judges he sued in connection with his discharge. 816 F.2d at 1155. Clearly the court recognizes

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2. Another recent and better reasoned Court of Appeals decision is *Guerico v. Brody*, 814 F.2d 1115 (6th Cir. 1987) which adopts the rationale of *McMillan v. Svetanoff*, 739 F.2d 149 (7th Cir.), *cert. denied*, — U.S. —, 107 S. Ct. 574 (1986) and rules that a judge's employment decision is not protected by judicial immunity.

that his job did not involve him in judicial decision-making. Nevertheless, the court holds, as a matter of law, that judicial immunity shields the judges who made the final decision to discharge him. 816 F.2d at 1154. The Seventh Circuit rules that the judges' decision to terminate Ohse was a judicial act because it was made after a pre-termination hearing conducted in a "judicial manner." 816 F.2d at 1144. The court reasons that because the act was done in a judicial manner, it cannot be argued that the judges were acting in an executive, as opposed to judicial capacity. *Id.*

The decisions in *Crooks* and *Ohse* signal the toppling of the house of cards of judicial immunity. They reflect not only a misunderstanding of the doctrine, but also what Judge Cudahy, in his dissent to the *Ohse* opinion, calls "a bias in the cases toward granting absolute immunity to judges." 816 F.2d at 1157. The potential for this kind of bias was also noted by the majority opinion in *Crooks:* "Perhaps cases involving judicial immunity should not be decided by judges. At present, however, there is no escape for judges from this duty. Mass recusals would solve nothing." 820 F.2d 331. Judge Posner recognizes in his dissent herein, that this potential for bias results from judges' "vocationally sharpened sensitivity" in the judicial immunity area. (A-25) For this and other reasons (See Brief of Petitioner, 18-19), this area of the law cries out for a general rule. The Seventh Circuit fails to provide the necessary guidance: "We cannot set forth a general rule . . . ." (A-20) It is essential that this court enunciate a clear, unambiguous rule for the application of the doctrine of judicial immunity to employment discrimination cases. This Court must draw a bright line

between judges' acts of adjudication and other official, although not judicial, acts.

Respectfully submitted,

MARY ANNE SEDEY
(Counsel of Record)
2256 South Grand Boulevard
St. Louis, Missouri 63104
(314) 773-3566

Counsel of Petitioner

MOTION FILED
JUL 24 1987

No. 86-761 (4)

In The

Supreme Court of the United States

October Term, 1987

CYNTHIA A. FORRESTER,

Petitioner,

v.

JUDGE HOWARD LEE WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE and BRIEF OF AMICUS CURIAE, ILLINOIS JUDGES ASSOCIATION

BRIAN L. CROWE
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400
Attorney of Record for
Amicus Curiae
Illinois Judges Association

Of Counsel:

SUE AUGUSTUS
JUDITH E. FORS
4669 North Manor Avenue
Chicago, Illinois 60625
(312) 583-8016

Pandick Technologies, Inc., Chicago • (312) 236-0200

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Illinois Judges Association (hereinafter the Association), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondent, Judge White, that the decision below be affirmed. Consent to file this brief has been sought from the parties and granted by respondent, but counsel for petitioner has refused to consent. The Association therefore requests leave of this Court to file the accompanying brief, pursuant to Rule 36.3.

The Illinois Judges Association is a not for profit organization established in December, 1971. Its present membership consists of approximately 750 active and retired state court judges. The Association was formed to promote the common interests of its members in improving the judiciary, the administration of justice, and the confidence of the public therein. To that end, the Association has filed briefs *amicus curiae* in other cases impacting on the judiciary.

The specific purposes of the Association are: a) to create a liaison between the judges of the State of Illinois; b) to encourage continuing legal education; c) to resolve common problems; d) to encourage the highest level of performance from its individual members; e) to foster public confidence in the judiciary; f) to improve efficiency in the administration of justice; and g) to bring the people of the State of Illinois a court system of the highest standards.

This case is of substantial importance to the Association because of the adverse effect that erosion of the doctrine of judicial immunity would have on the administration of the judiciary and on the ability of the judiciary to attract and keep high quality jurists. The Association has concluded that operation of the court sys-

tem and the independence of the judiciary would suffer if the decision of the court below were reversed.

The Association believes the accompanying brief will be of assistance to this Court because the Association is intimately familiar with the judiciary in Illinois and particularly the rules governing judicial misconduct and the sanctions available for their breach.

The Illinois Judges Association therefore moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

July 24, 1987

BRIAN L. CROWE
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400
Attorney of Record for
Amicus Curiae
Illinois Judges Association

Of Counsel:

SUE AUGUSTUS
JUDITH E. FORS
4669 North Manor Avenue
Chicago, Illinois 60625
(312) 583-8016

Subscribed and sworn to before me
this 24th day of July, 1987.
My Commission expires 10/4/88

Notary Public

TABLE OF CONTENTS

Page

Table of Contents iii

Table of Authorities iv

Interest of Amicus Curiae 1

Summary of the Argument 2

Argument 2

I. THE SEVENTH CIRCUIT DID NOT EXPAND THE SCOPE OF ABSOLUTE JUDICIAL IMMUNITY TO SHIELD A JUDGE'S PERSONNEL DECISIONS BUT PROPERLY APPLIED THE LAW TO FIND THAT THE DISCHARGE OF THE PROBATION OFFICER IN THIS CASE WAS A JUDICIAL ACT 2

II. EFFECTIVE SANCTIONS ALREADY EXIST FOR JUDICIAL MISCONDUCT 5

III. THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY FROM EMPLOYMENT DECISIONS RELATING TO PROBATION OFFICERS IN ILLINOIS IS VITALLY IMPORTANT TO ENSURE AN EFFECTIVE AND INDEPENDENT JUDICIARY AND TO ATTRACT AND KEEP HIGH CALIBER JURISTS 7

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Page

Forrester v. White, 792 F.2d 647 (7th Cir. 1986), *cert.* granted 107 S.Ct. 1282 (1987) 3, 4

Imbler v. Pachtman, 424 U.S. 409 (1976) 5

People ex rel. Harrod v. Illinois Courts Commission, 69 Ill.2d 445, 372 N.E.2d 52 (1977) 6

Pulliam v. Allen, 466 U.S. 522 (1984) 5

Stump v. Sparkman, 435 U.S. 349 (1978) 4

Constitutions and Statutes

Ill. Const., art. IV, sec. 13 7

Ill. Const., art. VI, sec. 12(d) 7

Ill. Const., art. VI, sec. 13(a) 6

Ill. Const., art. VI, sec. 15 6

Ill. Const., art. VI, sec. 15(c) 6

Ill. Const., art. VI, sec. 15(f) 6

42 U.S.C. sec. 1988 8

Ill. Rev. Stats., ch. 37, sec. 706-1 3

Ill. Rev. Stats., ch. 37, sec. 706-5(1) 3

Ill. Rev. Stats., ch. 38, sec. 204-1 3

Ill. Rev. Stats., ch. 38, sec. 204-4 3

Court Rules

Cases: *Page*

Illinois Code of Judicial Conduct, Committee Commentary, Smith-Hurd Illinois Annotated Statutes ch. 110A, sec. 71 (1987 pocket part). 6

Other Authorities

Carlisle, *Honorary Memberships May Exploit Judicial Position*, 58 Fla. Bar J. 99 (Feb. 1984) 8

Gray, *Ethical Conduct in a Judicial Campaign and is Campaigning an Unethical Activity?*, 57 Wash. L. Rev. 119 (Dec. 1981). 8

Hager, *Judges, Once Politicians, Face Recusal Problems*, Legal Times of Washington, Sept. 9, 1984 at p.24. 8

Honig, *Judges Given Guidance on Extrajudicial Activities*, 117 N.J.L.R. 1 (Mar. 1986) 8

Middleton, *Hunger and Ethics: No Conflict in Judge's Case*, 69 ABA J. 573 (May 1983) 8

Plotkin and Mazorol, *Judicial Malpractice: Pulliam is not the Answer*, Trial (Dec. 1984). 8

Roth and Hagan, *The Judicial Immunity Doctrine: Between the Bench and a Hard Place*, 35 Juv. and Fam. Ct. J. 3 (Fall 1984) 8

No. 86-761

In The
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Petitioner,

v.

JUDGE HOWARD LEE WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF ILLINOIS JUDGES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

Pursuant to Rule 36 of the Rules of this Court, the Illinois Judges Association respectfully submits this brief as *amicus curiae* in support of the Respondent.

INTEREST OF ILLINOIS JUDGES ASSOCIATION

The interests of the Illinois Judges Association in this matter are set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

The Association urges this Honorable Court to affirm the ruling of the court below. The Seventh Circuit correctly held that the probation officer's duties are intimately related to the functioning of the judicial process in Illinois and thus within the scope of judicial immunity. The decision does not expand judicial immunity, but is consistent with its purpose - to allow the judiciary to function without fear of civil damage actions for judicial acts. Because of the statutory obligations imposed on a judge and a probation officer in Illinois, employment decisions relative to probation officers are an integral part of the judge's duties in the performance of his judicial acts.

Moreover, the affirmance of the court below will not shield judges from any sanctions for judicial misconduct. Even if plaintiff's compensatory remedies are limited by judicial immunity, the judge's behavior can be effectively controlled by judicial discipline and removal from office.

Finally, the doctrine of judicial immunity is vitally important. Judges, personally and professionally, are scrutinized daily by the public and the press. In order to keep high caliber jurists on the bench, to ensure an efficient and independent judiciary, and to attract high quality lawyers to the bench, the doctrine of judicial immunity must protect the judiciary from monetary damages for judicial acts.

ARGUMENT

I. THE SEVENTH CIRCUIT DID NOT EXPAND THE SCOPE OF ABSOLUTE JUDICIAL IMMUNITY TO SHIELD A JUDGE'S PERSONNEL DECISIONS BUT PROPERLY APPLIED THE LAW TO FIND THAT THE DISCHARGE OF THE PROBATION OFFICER IN THIS CASE WAS A JUDICIAL ACT.

In its decision in this case, the Court of Appeals properly found that the duties of the plaintiff probation

officer were intimately related to the function of the judicial process in Illinois. Thus, Judge White's decision to demote and fire plaintiff were judicial acts performed within the scope of his authority. The Seventh Circuit did not expand the scope of absolute immunity or leave the scope uncertain, but instead furthered the objective of the doctrine.

In Illinois, the chief judge of each circuit appoints a director of the probation department in the circuit pursuant to statute. Ill. Rev. Stat. (1979), ch. 38, sec. 204-1; Ill. Rev. Stat. (1979) ch. 37, sec. 706-5(1). The statutes charge the judge not only with hiring the director, but also with determining when other probation personnel are needed. The duties of the probation officer are similarly prescribed by statute. Ill. Rev. Stat. (1979), ch. 38, sec. 204-4; Ill. Rev. Stat. (1979), ch. 37, sec. 706-1.

The judge depends on the probation officer for three main purposes: preparation of presentence reports in all felony cases; monitoring adult probationers; and filing petitions for revocation of probation as necessary. As the Court of Appeals correctly noted: "Decisions regarding, for example, sentencing, probation, and the revocation of parole and probation are unquestionably judicial acts, and the plaintiff provided crucial advice and information necessary to making those decisions." *Forrester v. White*, 792 F.2d 647, 657 (7th Cir. 1986), *cert. granted* 107 S.Ct. 1282 (1987).

Because the judge is accountable to the public for the conduct of individuals to whom he grants probation, a judge must have complete confidence in the probation officer upon whose opinion the probation decision is heavily based. Few other court employees have a quasi-judicial function - neither bailiffs, sheriffs, clerks nor court reporters have the statutory authority to investigate and make recommendations for the disposition of cases before the court. In fact, the liberty of a person on probation is for

all practical purposes in the hands of the probation officer.

The Seventh Circuit's opinion in the case at bar recognizes this distinction between probation officers and other court personnel, noting, for example, that a court reporter or bailiff is not usually required to provide a judge with information and advice regarding the substance of litigation pending before the court. 792 F.2d at 656, fn. 9. This recognition aided the Court in deciding, under the analysis of *Stump v. Sparkman*, 435 U.S. 349 (1978), that the dismissal of the plaintiff probation officer was a function normally performed by a judge in Illinois and that the probation officer was dealing with the judge in his official capacity. 792 F.2d at 656, 657.

Contrary to Judge Posner's dissenting view, the Seventh Circuit's analysis does not leave the scope of the doctrine of judicial immunity uncertain. Instead, the opinion sets out a practical standard for determining what judicial decisions can be fairly characterized as judicial acts. The opinion does not, as plaintiff would lead this Court to believe, expand the scope of absolute judicial immunity to all personnel or employment related decisions made by judges. In fact, the decision puts judges on notice that most personnel related decisions will not be accorded the protection of judicial immunity. 792 F.2d at 656, fn.9.

Affirmance of the decision below would serve a dual purpose. First, affirmance will enable a judge to work only with probation officers in whom he has total trust since he will be able to discharge an officer in whom he has lost confidence without fear of litigation resulting in money damages. Thus the judge would carry out his judicial functions efficiently and independently.

Second, the public would be served by affirmance. Individuals who commit crimes while on probation are a detriment to society. An effective working relationship between a judge and his probation officer is critical to the process of evaluating the appropriateness of probation in

each case. Further, the breakdown of the relationship between a judge and his probation officer could also adversely affect individuals who should receive probation but do not because the judge does not trust the favorable report received from an officer in whom he has lost confidence. Finally, the public is also served by a system in which judges are free to exercise independent judgment without fear of suits for monetary damages.

Since the decision below correctly recognizes that probation officers in Illinois are an intregal part of the judicial process and the purpose of the judicial immunity doctrine is furthered by this finding, the Court of Appeals should be affirmed.

II. EFFECTIVE SANCTIONS ALREADY EXIST FOR JUDICIAL MISCONDUCT.

The Association does not condone discrimination in any form. There are effective sanctions, however, for those instances of judicial misconduct which occur, even if plaintiff's compensatory remedies are limited by judicial immunity. Judicial discipline and removal from office are viable alternatives available in Illinois.

Judges in some instances are subject to criminal liability. As stated in *Imbler v. Pachtman*:

> Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. Sec. 242, the criminal analog of Sec. 1983.

424 U.S. 409, 429 (1976). *Accord, Pulliam v. Allen*, 466 U.S. 522, 540-541 (1984).

Judges who engage in misconduct are also subject to removal from office by impeachment, (Ill. Const., art. IV, sec. 13), defeat at election, or judicial action. Illinois judges are elected, and sitting judges may be retained only upon receiving sixty percent of the vote. Ill. Const. art. VI, sec. 12(d). Removal at the ballot box in Illinois is an increas-

ingly common occurrence as bar associations and the media have stepped up their efforts to inform the electorate about the merits of judicial candidates. The remedy of defeat at the polls should not be lightly dismissed.

Illinois, like most states, has an administrative procedure for judicial discipline. Article VI, Section 15 of the Illinois Constitution creates two entities to review judge's acts: the Judicial Inquiry Board and the Courts Commission.

Illinois' Judicial Inquiry Board receives, investigates, and files complaints regarding judges with the Courts Commission. The Board may file a complaint to charge the judge with willful misconduct in office, persistent failure to perform his duties, other conduct that is prejudicial to the administration of justice, conduct that brings the judicial office into disrepute, or physical or mental incapacity to perform his duties. Ill. Const. art. VI, sec. 15(c).

Illinois' Courts Commission hears complaints filed by the Judicial Inquiry Board. The Commission can remove a judge from office, suspend him without pay, censure, reprimand or retire a judge for misconduct or incapacity. Ill. Const. art. VI, sec. 15(f).

As required by Article VI, Section 13(a) of the Illinois Constitution, the Illinois Supreme Court has adopted rules governing judicial conduct. Violation of these rules is grounds for judicial discipline. Illinois Supreme Court Rule 71 (1987); former Illinois Supreme Court Rule 62 (repealed 1987); *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill.2d 445, 470, 372 N.E.2d 52 (1977).[1]

In sum, there are sufficient alternative sanctions available to deter misconduct on the part of the judges. The consequences of removal go beyond losing judicial office

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[1] At the time of the events in this case, Illinois judges were governed by the standards of judicial conduct in Illinois Supreme

(Footnote continued on the following page)

and may deprive a judge from returning to the practice of law or losing his retirement benefits. Absolute immunity from civil damages does not shield judges from sanctions for misconduct.

The decision of the Court of Appeals should be affirmed.

III. THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY FROM EMPLOYMENT DECISIONS RELATING TO PROBATION OFFICERS IN ILLINOIS IS VITALLY IMPORTANT TO ENSURE AN EFFECTIVE AND INDEPENDENT JUDICIARY AND TO ATTRACT AND KEEP HIGH CALIBER JURISTS.

As already discussed in this brief, the duties of a probation officer in Illinois are intimately related to the administration of justice. A reversal of the court below would "chill" independent decision-making and harm the effectiveness of the judiciary. Furthermore, an adverse decision would tend to discourage high quality lawyers from seeking judicial office and drive able jurists into premature retirement.

The court system today is a complex institution. A judge faces an array of issues concerning his personal and professional conduct, issues which do not arise in the private practice of law. Judicial ethics, which universally forbid the "appearance of impropriety," impact, for example, on a judge's campaign conduct in a retention election, his honorary memberships, receipt of honorary awards, participation in charitable endeavors, financial

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1 *(Continued)*

Court Rules 61 through 71. As of January 1, 1987, these Illinois Supreme Court Rules were replaced by standards that follow the ABA Canons of Judicial Conduct. These new standards are substantially similar to the earlier standards. Committee Commentary, p.7, Smith-Hurd Illinois Annotated Statutes, 1987 pocket part.

disclosure, participation in public debate, and recusal in certain cases.[2]

The erosion of absolute judicial immunity may affect a judge's ability to effectively control his docket and courtroom. A judge may hesitate to make decisions relating to quasi-judicial officers because his reasons may be misconstrued and used against him in lawsuits for monetary damages. These concerns can be assuaged by affirmance of the court below and a commitment from this Court that further erosion of the doctrine of absolute judicial immunity will not be forthcoming.

Judicial concern over recent developments in the immunity doctrine is well founded.[3] Already liable for attorney's fees under Section 1988 (Title 42 U.S.C. Sec. 1988), reversal of the court below would saddle judges, who face increasingly large dockets and receive relatively little compensation, with yet one more reason to leave the bench. The Association fears that this added burden will increase the flight of capable jurists back to private practice.

The Association urges this Court to affirm the opinion of the Seventh Circuit to ensure a high quality and independent judiciary.

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[2] *See*, Gray, *Ethical Conduct in a Judicial Campaign and is Campaigning an Unethical Activity?*, 57 Wash. L.R. 119 (Dec. 1981); Carlisle, *Honorary Memberships May Exploit Judicial Position*, 58 Fla. Bar J. 99 (Feb. 1984); Honig, *Judges Given Guidance on Extrajudicial Activities*, 117 N.J.L.J. 1, (Mar.20, 1986); Middleton, *Hunger and Ethics: No Conflict in Judge's Case*, 69 ABA J. 573 (May 1983); Hager, *Judges, Once Politicians, Face Recusal Problems*, Legal Times of Washington, September 9, 1984 at p. 24.

[3] Roth and Hagan, *The Judicial Immunity Doctrine: Between the Bench and a Hard Place*, 35 Juv. and Fam. Ct. J. 3, (Fall 1984); Plotkin and Mazorol, *Judicial Malpractice: Pulliam is not the Answer*, Trial (Dec. 1984) at 24.

CONCLUSION

The Illinois Judges Association was organized to improve the judiciary, the administration of justice and the confidence of the public in the judiciary. Assisting judges in understanding their ethical obligations and conforming to those obligations is a major purpose of the Association. Interpreting court decisions impacting on judges *qua* judges is another. The importance of this decision cannot be understated. If this Court affirms the lower court, the judge in Illinois will know that his decision to hire and fire probation officers will not be the subject of a suit for monetary damages. The opinion of the court below means nothing more than that. In fact the decision sounds a warning that a judge's decisions relative to other court personnel are probably not protected by the doctrine of judicial immunity.

The Association urges affirmance of the Seventh Circuit's opinion. The decisions of this Court and the necessities of judicial administration show that judicial immunity must be extended to employment decisions of quasi-judicial officers, such as the probation officer in this case. Judges do not need judicial immunity regarding employment decisions for all court personnel, and the opinion below does not expand the scope of the doctrine to cover all such decisions. In order to keep an independent and effective judiciary, the court of appeals should be upheld.

Respectfully submitted,

Of Counsel:
SUE AUGUSTUS
JUDITH E. FORS
4669 North Manor Ave.
Chicago, Illinois 60625
(312) 583-8016

BRIAN L. CROWE
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400
Attorney of Record for Amicus Curiae Illinois Judges Association